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RIGHT OF A MARRIED WOMAN TO CONVEY REAL ESTATE WITHOUT HER HUSBAND'S CONSENT UNDER A STATUTE GIVING HER THE RIGHT OF CONTRACT.

A decision of very wide importance was that rendered by the Supreme Court of Missouri in the recent case of Farmers' Exchange Bank v. Hageluken, 65 S. W. Rep. 728. In this case an action was instituted against one Isabella Hageluken, and her husband, to foreclose a certain deed of trust, given to secure certain promissory notes in suit, which notes and deed were executed by Isabella while covert. Her husband did not join in executing such deed, and upon this ground she resisted the suit of foreclosure, asserting that her husband did not join with her in the execution of the trust deed, and for this reason she was incompetent to convey the land mentioned in the deed aforesaid. Thus the most prominent question in this case was whether Isabella, under statute existing at the time, was capable of making the litigated contract. The statutes on the subject, under one section, vested a married woman with power to transact business on her own account, and to make contracts, and, under another section, provided that real estate belonging to a married woman shall be her separate property. The court held that under these provisions of the statutes a married woman may convey the legal title, by her deed of trust, without her husband joining therein, of lands acquired by her since the passage of such laws. Three judges out of four dissented; and it is interesting to note, as illustrated the unsettled condition of this subject, that the views expressed in this case are absolutely out of accord with those of the recent case of Brown v. Dressler, 125 Mo. 589, 29 S. W. Rep. 13, which is necessarily overruled.

The difficulty with this question is not in the words of the statute but in the minds of the judges themselves who are unable to free themselves from an ultra-conservatism which protests against such a radical upheaval of the common law as is evidenced by these statutes, and fail to see in them that spirit of liberality and fairness which has prompted this character of legislation looking toward the ultimate emancipation of married women from the shackles by which she was fettered at common law. Mr. Bishop stated clearly the purpose and effect of such legislation in the following language: "Under the unwritten law a married woman might hold property in ways which were well defined. If legislation then added to this law a statute, simply providing another way in which she might hold property, the presumption was that, since she was still a wife, the law-making power meant it should be in her hands wife's property. As to it, in the same manner as to everything else, she would remain under the established restraints of coverture. But if the statute went further, and provided that the property should be hers in the same manner as though she were unmarried, this further provision would directly negative the presumption, and make the woman a *feme sole* as respects this estate, both at law and in equity. Consequently she could sell it, or enter into contracts regarding it, precisely the same as though she were still unmarried. The author can perceive no way in which it is possible for this conclusion to be avoided."

The rule as announced in this case is supported in other states having similar statutes. Thus, in Maine, the statute provided that "the contract of any married woman, made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were sole," etc. Pub. Laws 1866–68, ch. 52. And upon this statute it was ruled that a married woman was bound as surety on a promissory note which she had signed with a stranger; Appleton, C. J., remarking: "The wisdom or expediency of this act is a matter solely for the legislature. Its language is most general, and there can be no reasonable doubt as to its meaning." Mayo v. Hutchinson, 57 Me. 546. Thus, in New York, Andrews, J., speaking for the court, said: "The statute of March 20, 1860, provides that a married woman may carry on any trade or business and perform any labor or services on her sole and separate account, and that the earnings therefrom shall be her sole and separate property. The power of a married woman to make contracts relating to her separate business is incident to the power to conduct it. It cannot be supposed that the

legislature, while conferring the power upon a married woman to enter into trade or business on her own account, intended that her common-law disability to bind herself by contract should continue as to contracts made in carrying on the business in which she was permitted to engage. The power to engage in business would be a barren and useless one, disconnected with the right to conduct it in the way and by the means usually employed."

NOTES OF IMPORTANT DECISIONS.

MASTER AND SERVANT—WHETHER A SERVANT WHO WORKS DURING THE DINNER HOUR IS A VOLUNTEER. — High-minded and philanthropic old gentlemen, in speaking to young men striving to get a foothold in business, often advise them never to look at the clock and to override the appointed hours for eating and sleeping with a ruthless desire to improve their employer's interests. While this is a very beautiful and proper sentiment, the courts have not always encouraged it. Especially is this the fact in determining the relation existing between master and servant during the interval known as the dinner hour. There has always been a doubt expressed by the courts as to the liability of the master for any injury to the servant during this interval in which he is not expected to work. In regard to any work which he may do for the master during that time he seems to be regarded by some courts as a volunteer. However, in the recent case of Mitchell-Tranter Co. v. Ehmett, 65 S. W. Rep. 835, the Court of Appeal of Kentucky held that a servant who works during the dinner hour does not for that reason alone become a volunteer, so as to relieve the master of liability for an injury to him resulting from a defect in the premises.

This is in line with the case of Broderick v. Depot Co., 56 Mich. 261, 22 N. W. Rep. 802, 56 Am. Rep. 382, where the court said: "It does not follow that, because plaintiff was given an intermission from work for an hour and a half for dinner, he ceased during that time to be the servant of defendant. If, during that time, he had in his care or custody any of his master's property, requiring his attention and oversight, or if called upon to perform work by the master, or by one having authority to command his service, the relation would still exist, arising in the one case from the duty to properly care for the property of the master, and in the other from the duty to perform the service."

The authorities, however, are in conflict on the general question as to assumption by the servant of risks outside of the employment. The true rule and its limitation may be stated as follows: Where a servant performs, of his own motion, dangerous work, which is out of his line of employment, without the order or consent of the master, and he is injured thereby, the master is not liable. Chrelinsky v. Townsend Co. (Del 1894), 1 Marv. 273, 40 Atl. Rep. 1127; Parent v. Mfg. Co., 70 N. H. 199, 47 Atl. Rep. 261; Pfeffer v. Stein, 50 N. Y. S. 516; Allen v. Hixon, 111 Ga. 460, 36 S. E. Rep. 810. But a servant, even though he knows the danger incident to the use of an appliance, does not, by using it at the direction of the master in a service not incident to his employment, assume the risk, unless the danger is such that an ordinarily prudent man would not encounter it. Dallemand v. Saalfeldt, 75 Ill. App. 151, affirmed 175 Ill. 310, 51 N. E. Rep. 645; Indiana Natural, etc. Gas. Co. v. Marshall (Ind. 1898), 52 N. E. Rep. 232; Brown v. Railroad Co. (Mich. 1898), 76 N. W. Rep. 407; Blackman v. Electric Co. (Ga. 1897), 29 S. E. Rep. 120.

COMMERCE—RIGHT OF STATE UNDER THE POLICE POWER TO EXCLUDE THE IMPORTATION OF ADULTERATED ARTICLES.—The conflict between state and federal jurisdictions as to how far the states may interfere with interstate commerce under the guise of the police power, has become one of the most interesting questions of constitutional law. The question arose recently in the case of Crossman v. Lurman, 63 N. E. Rep. 1097, over the construction of an act of the New York legislature, relating to the adulteration of food, and providing that an article shall be deemed adulterated if it be colored or coated or polished, or powdered, whereby damage is concealed, or it is made to appear of greater value than it really is. The court held this act as not in violation of the interstate commerce clause of the federal constitution, as an attempt to prohibit the sale of goods imported into the state in original packages, as the state has a right to inspect such goods, and, if adulterated, may exclude them altogether. The court puts its decision on the right of the state under the police power to inspect imported goods, and reject those which are injurious to health or morals. The court said in part:

"The states have no power to regulate commerce with foreign countries or with each other. This power has been delegated to the congress of the United States, and that body can, by law, determine what shall or shall not be permitted to be imported. With the right of importation follows the right of sale in original packages, and therefore the states cannot prohibit the sale of articles of commerce within their borders. The states cannot, under the guise of inspection, or under their reserved police powers, prohibit the importation into their jurisdictions of sound meat under the pretense that it may be damaged or decayed, or Texan cattle for fear they may be diseased, or spirituous or malt liquors for fear that they may intoxicate, or oleomargarine for fear it may be adulterated. Railroad Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527; Bowman v. Railway Co., 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1032, 31 L. Ed. 700; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. Rep. 681, 34 L. Ed. 128; Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. Rep. 757, 43 L. Ed. 49. But to

this power delegated to congress there exist certain exceptions. The articles of commerce must be merchantable and of the character represented. The states, under the police powers reserved to them, may inspect and reject that which would be injurious to the public health or public morals and that which was designed to cheat or defraud the people. They may consequently inspect meats, and exclude such as has become damaged and unwholesome. They may inspect Texan cattle, and exclude those that are in fact diseased. They may inspect spirituous or malt liquors, and exclude such as are adulterated with poisonous or noxious chemicals injurious to public health. And they may inspect oleomargarine, and exclude that which is colored in imitation of yellow butter and represented to be such."

In Railroad Co. v. Husen, 95 U. S. 465, Justice Strong, in delivering the opinion, said: "We admit that the deposit in congress of the power to regulate foreign commerce and commerce among the states was not a surrender of that which may properly be denominated police power. What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health and safety." The cases of Powell v. Pennsylvania, 127 U. S. 678, and Schollenberger v. Pennsylvania, 171 U. S. 1, furnish an excellent illustration of a proper and an improper interference of interstate commerce on the part of the state. In the first case the court held that a statute prohibiting the sale of oleomargarine as *imitation* butter was a valid exercise of the police power, although necessarily interfering with interstate commerce. It was a valid exercise of that power for the purpose of preventing fraud, not merely imagined, but actually inherent in the subject-matter itself. In the latter case a statute absolutely prohibiting the sale of oleomargarine was held unconstitutional on the ground that it was not a *necessary*, and therefore not a proper exercise of the police power sufficient to give the state the right to interfere with interstate commerce. Justice Peckham, speaking for the court, said: "In the execution of its police powers, we admit the right of the state to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity, and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the state."

LICENSES — CONSTITUTIONALITY OF LICENSE TAXES UPON EMPLOYMENT AGENTS AND OTHER TRADES, OCCUPATIONS OR PROFESSIONS.— Whether the tendency is a wise one or not, it is settled that the constant encroachment upon the right to make a living in various trades and professions, in the shape of a license tax, is not to be seriously opposed by the courts, and legislatures, are, as a rule, given a free rein in their efforts in this direction. Thus, in the recent case of State v. Hunt, 40 S. E. Rep. 216, the question before the Supreme Court of North Carolina was whether an act imposing a tax of twenty-five dollars on persons engaging laborers to work in another state is a proper exercise of the police power of the state. The court held that it was, and that it did not interfere with interstate commerce or any other provision of either state or federal constitutions as to equality of taxation.

That such legislation does not violate any provision of the federal constitution has been conclusively settled by the recent case of Williams v. Fears (Dec. 10, 1900), 179 U. S. 270, 21 Sup. Ct. Rep. 128. The Georgia statute there called in question imposed a tax "upon each emigrant agent, or employer or employee of such agents, doing business in this state, the sum of five hundred dollars, for each county in which business is conducted." It is held in the opinion by Fuller, C. J., that this tax "upon emigrant agents (meaning persons engaged in hiring laborers to be employed beyond the limits of the state) does not amount to such an interference with the freedom of transit or of contract as to violate the federal constitution; nor does it deny the equal protection of the laws because the business of hiring persons to labor within the state is not subjected to a like tax. That these labor contracts are not in themselves interstate commerce, nor is the tax upon such occupation a burden upon such commerce." The opinion further holds that "the business itself is of such nature and importance as to justify the exercise of the police power in its regulation."

Two judges dissented from the conclusion arrived at in by the court in the principal case, and expressed their non-concurrence by the pen of Chief Justice Furches as follows: "If the constitution authorizes this tax I see no restriction upon the legislative power of taxation, except taxes on properties, moneys, and stocks, which shall be uniform. If it can tax a man for hiring hands to work on a railroad in another state, why not for hiring them to work on such roads in this state? And, if it can tax a man for hiring hands to work on a railroad in this state, why can it not tax a man for hiring hands to work in a factory or upon his farm? Indeed, why may it not tax a man who is 'engaged' in farming or carrying on a farm? That is a business, and to hire hands is to procure hands. This law provides that 'on every emigrant agent or person engaged in procuring laborers to accept employment in another state,' etc. An emigrant agent may be such a calling or business as might be taxed. But, in my opinion, one may engage in employing hands without being an agent; and, if he does, I do not believe the constitution will allow him to be punished as a criminal for so doing."

The late cases are generally in favor of sustaining occupation taxes. Thus, a tax on bankers is valid, although national banks are not subject to it. Brooks v. State (Tex. 1901), 58 S. W. Rep. 1032. So also a tax on photographers and photo-

graph galleries, although the constitution declares that no mechanical or agricultural pursuit shall ever be taxed. Mullinnix v. State (Tex. 1901), 60 S. W. Rep. 768. So also a tax on auctioneers of household goods at $50 per year, and other auctioneers at $25 per day, is declared not void as a discrimination against part of a class. Hull v. De Mattos, 23 Wash. 71, 62 Pac. Rep. 451. To same effect in case of a tax on persons selling goods within a certain city where traveling agents or persons selling on sample are excepted. State v. Willingham (Wyo. 1900), 62 Pac. Rep. 797. An act imposing a tax on tobacco buyers was declared valid in State v. Irvin, 126 N. Car. 989, 35 S. E. Rep. 989. So also a tax on peddlers or persons soliciting orders from house to house. Brownback v. North Wales, 194 Pa. St. 609, 45 Atl. Rep. 660. To same effect a state license tax of $200, and a local license tax of $350 in certain cities together with a deposit of $1,000 in the state treasury. State v. Foster (R. I. 1900), 46 Atl. Rep. 833. So also a tax on fishermen grading it according to the depth of water in which the fishing takes place. Morgan v. Commonwealth (Va. 1900), 35 S. E. Rep. 448; Lebaum v. Welker, 9 Kan. App. 887; Guano Co. v. Town of Karboro, 126 N. Car. 68. But in Cache County v. Jensen, 21 Utah, 270, 61 Pac. Rep. 303, it was held that neither the constitution nor the statutes authorized an ordinance by a board of county commissioners which singles out the one industry of sheep raising, and, under a pretense of licensing the business, imposes a tax per thousand on sheep, where there is no protection afforded by the ordinance to those engaged in the business, nor anything to indicate that any such regulation is required. Further, the court held generally that the charge of a license fee against a business or occupation, commendable and necessary for the public good, which, in effect, is prohibitory of such business or occupation, is void.

MUTUALITY IN THE ENFORCEMENT OF CONTRACTS FOR PERSONAL SERVICES.

There appeared recently in the CENTRAL LAW JOURNAL the decision of the Supreme Court of Pennsylvania, rendered April 21, 1902, the case of the Philadelphia Ball Club, Limited, v. Lajoie, and, in connection therewith, the careful annotation of Prof. John D. Lawson, particularly upon the question of "mutuality in contract law" as discussed in that decision. The decision in the main case related to the application of the principle of specific enforcement of contracts to agreements for the rendition of personal services, which are unique in character and accompanied by special skill and ability.

It is not denied that equitable jurisdiction to prevent, by injunction, the violation of a covenant not to render such services to any person other than the plaintiff, is well established at the present day. It is equally true that a contract for personal services of the kind referred to, must, under the conditions given, like every other valid agreement, have within itself the element of mutuality, and it is to this aspect of such contracts that I propose to deal somewhat in this paper.

The term mutuality simply implies the obligation of both parties to perform the respective stipulations assumed by them, and which are the reciprocal considerations upon which the contract is rested. Unless the intended agreement has reached the stage where both parties are bound thereby, it is not a contract in the legal sense of that term. To use the language of Mr. Bishop: "Unless both are bound so that an action could be maintained by either against the other for a breach, neither will be bound. This proposition is axiomatic, not admitting of being overthrown by authorities so long as the law requires something of value as a consideration. For where it is admitted that there is nothing for A's promise to rest on but B's promise, if B has not promised, A's promise rests on nothing and is void.[1]

Although mutuality of obligation is essential to the creation of a contract, yet such mutuality does not require identity of redress. Obviously the injury to the respective parties arising from the breach of their agreement may differ most widely. Indeed, it can rarely ever be the same. The proximate loss of the two parties must always depend upon the nature, kind and subject-matter of their contract and its results as reasonably contemplated. Not only does the measure of compensation of the two parties for breach of their contract, often differ in extent, but in many cases totally different remedies may be employed by them to enforce their respective rights upon breach of the contract by the other. Thus, in the case of an agreement to exchange stock for a yacht, it was held that though one of the parties would have been entitled to specific performance the other was not, but was relegated at his action at law—there being nothing to show it was inadequate—for damage for failure to deliver the stock.[2]

[1] Bishop on Contracts, sec. 78.
[2] Ackstein v. Downing, 64 N. H. 248.

Accordingly it was also held in Baumgardner v. Leaveitt[3] that a contract to convey shares of stock, though not generally enforceable, would be specifically enforced where the stock has a unique and special value to the purchaser, the loss of which cannot be fully compensated by damages at law. In Sayward v. Houghton[4] it was held that a contract for the sale of stock became mutually obligatory upon tender to the purchaser within the time specified, and would therefore be enforced. In O'Niell v. Webb[5] specific performance of a contract for sale of three shares of stock was decreed for the reason that it would give the transferee half of the stock of the corporation, wherefore power and influence in its management thus arising gave the stock a special value which entitled the purchaser to secure its possession by bill in equity. Said the court: "We think, therefore, that the case is exceptional, and that plaintiff has no adequate remedy at law. We are fully justified in this view by Cook on Stock and Stockholders, sections 337, 338. And we likewise regard the case of Jones v. Williams, 139 Mo. 36-38, as an authority in support of the proposition." In Ryan v. McLane[6] the court distinguished the case under review from the general rule which it quoted with approval from section 338, Cook on Stock, Stockholders and Corporation, to-wit: "If the stock contracted to be sold is easily obtainable in the market, and there are no particular reasons why the vendee should have the particular stock contracted for, he is left to his action for damages. But where the value of the stock is not easily obtainable, or the stock is not to be obtained elsewhere, or there is some particular and reasonable cause for the vendee's requiring the stock contracted for to be delivered, a court of equity will decree a specific performance and compel the vendee to deliver the stock." The learned annotator of this opinion,[7] after a thorough review of the American and English cases relevant to the subject, extracted therefrom the principles thus expressed by him: "In conclusion a contract for the purchase of stock in a corporation will not generally be enforced in this country where similar stock can be procured in the market and its value can be readily ascertained, unless the purchaser has some particular reason for desiring the stock, although it would seem that there is a tendency to allow this relief to a greater extent than formerly. In England it is the rule to allow it almost as a matter of course in cases of contracts for stocks of private or business corporations."

In the case cited by the Kansas City Court of Appeals, the Supreme Court of Missouri affirmed the right of the editor of a newspaper to enjoin the stockholders of the corporation which employed him from dispensing with his services, on the ground that his dismissal would have left him without adequate remedy by an action for damages at law. It was, of course, not claimed in that case that the corporation had the correlative right by mandatory injunction to compel their employee to edit the paper. In the case of O'Brien v. Jaccard Jewelry Co.,[8] the doctrine was discussed in its application to the breach of his contract of services by a salesman. The court conceded that the right to enjoin the breach of a negative covenant in such contract, if the qualifications of the employee had been shown to be unique, individual and peculiar, but held these facts were not established by the proof and hence refused the writ. Said the court in that case: "When such contract is broken, the same service if not readily or easily obtainable from others and the resulting damage is irreparable, in that it cannot be estimated. This forms the basis for the exercise of equitable jurisdiction. 2 Beach on Modern Eq., sec. 772; 3 Pom. Eq. Jur., sec. 1343; Rogers v. Rogers (Conn.), 20 Atl. Rep. 467; High on Injunctions, secs. 1162-1164; Cort v. Lassard, 18 Oreg. 221; Burney v. Ryle, 91 Ga. 701; McCaul v. Graham, 16 Fed. Rep. 37; Fredericks v. Mayer, 13 How. Pr. (N. Y.) 566. It is clear, we think, that the facts in the case at bar do not bring it within the rule."

It seems clear, from the foregoing cases, that the enforceability of contracts for the purchase of shares of stock or personal services by requiring, in the one case, the delivery of the stock, and, in the other, by restraining the breach of a negative covenant (not to ren-

[3] 35 W. Va. 194.
[4] 119 Cal. 545.
[5] 78 Mo. App. 1.
[6] 91 Md. 175, decided 1900.
[7] L. R. A. 50, p. 501.
[8] 70 Mo. App. *l. c.* 435.

der the services elsewhere), is rested altogether upon the proof of the special and exceptional value of the thing bought—*i. e.*, stock or personal services— and its consequent incomputable value in an ordinary action at law for damages for breach of contract. And it is equally clear that the very ground upon which the jurisdiction to enforce such contracts in the two ways is predicated, is the essential difference in the damages resulting to one party from a breach of contract by the other. For the relief is awarded to the one party solely on the ground that his loss is not ascertainable by an action of damages at law, and is, therefore, under the peculiar statute and decisions of this state relievable by injunction.[9] On the contrary, the other party, who has sold his stock or his personal services for a fixed price, can always be fully compensated by a judgment for that sum. The result is that, according to the established law in this state and elsewhere, the "mutuality" necessary to sustain a contract may co-exist with inequality of compensation and essential differences of remedy, according as the breach is by the one or the other of the two parties. This is exactly what was determined by the Supreme Court of Pennsylvania, and is submitted to be the only conclusion which can be reached upon a careful review of the adjudged cases bearing on this topic.

On this point said the Pennsylvania court: "The term 'mutuality' or 'lack of mutuality,' does not always convey a clear and definite meaning. As was said in Grove v. Hodges, 55 Pa. 516: 'The legal principle that contracts must be mutual does not mean that in every case each party must have the same remedy for a breach by the other.' In the contract now before us the defendant agreed to furnish his skilled professional services to the plaintiff for a period which might be extended over three years by proper notice given before the close of each current year. Upon the other hand, the plaintiff retained the right to terminate the contract upon ten days' notice and the payment of salary for that time and the expenses of defendant in getting to his home. But the fact of this concession to the plaintiff is distinctly pointed out as a part of the consideration for the large salary paid to the defendant, and is emphasized as such; and owing to the peculiar nature of the services demanded by the business, and the high degree of efficiency which must be maintained, the stipulation is not unreasonable. Particularly is this true when it is remembered that the plaintiff has played for years under substantially the same regulations. We are not persuaded that the terms of this contract manifest any lack of mutuality in remedy. Each party has the possibility of enforcing all the rights stipulated for in the agreement. It is true that the terms make it possible for the plaintiff to put an end to the contract in a space of time much less than the period during which the defendant has agreed to supply his personal services; but mere difference in the rights stipulated for does not destroy mutuality of remedy. Freedom of contract covers a wide range of obligation and duty as between the parties, and it may not be impaired, so long as the bounds of reasonableness and fairness are not transgressed." The court then held that inasmuch as the damages caused by the breach of defendant's covenant not to play with any other club were not susceptible of admeasurement by any "certain pecuniary standard" they were irreparable in a legal sense[10] and injunction should issue.

Now, what was the contract before the Pennsylvania Supreme Court? Its reciprocal considerations were, on the one side, the right to terminate it upon ten days' notice and payment of a sum agreed upon as compensation for this privilege, and for services up to that time, together with expenses of the player to his home. On the other side, the consideration was the rendition of services of peculiar skill and ability, both as an individual player and as an essential co-efficient in the unity and excellence of team work coupled with obedience and observance of moral behavior. It is thus apparent from this analysis that the compensation of the player was added to, so that in addition to compensating him for the labor of performance of services, it should also fully compensate him for the exercise of the power to terminate the contract, which he agreed might be exercised by the employer. The necessity for the reservation of the power to discharge grew out of the peculiar nature and kind of work the player was engaged to do. Knowledge of it came to the player as a result of his proficiency and training. He

[9] 65 Mo. 638; 69 Mo. 65; 81 Mo. 493; 139 Mo. 37.

[10] 69 Mo. 65.

knew from experience that without unlimited control of the members of its team the owner could not by proper fitting in, and adaptation of players, constitute a whole body, capable of the highest efficiency and excellence in ball playing. The player also knew from his own experience and success the necessity of harmony, emulation, and perfect physical form and faculty, on the part of each member of the team, in order to bring its work to a state of perfection, and that at any moment a single recalcitrant player would mar the work of all. It is thus demonstrable that it was the very nature of the business itself which prescribed the provision of the contract for prompt discharge, as a disciplinary power essential in the creation of a team of players of the highest individual and collective excellence in ball playing. With this important feature of the contract before their very eyes, the parties, by stipulation, added enough, to the salary to be paid the player, to pay also for this concession by him. What element of mutuality of obligation was thereafter lacking? None. Both parties were bound, and that, too, specifically and definitely as they had agreed to be bound.

When a contract is intelligently and fairly entered into it cannot be that either party is at liberty to commit a breach thereof without incurring that degree of restriction and liability which he agreed to bear, as far as within the power of the courts to enforce. But if he may do so with impunity, does it follow that a contract intelligently made, free from coercion, resting upon full consideration and relating to a subject—rendition of personal services—embracing the great bulk of human engagements, is to be held, notwithstanding such elements and the inherent right of freedom of contract, totally unenforceable by any process tending to protect the innocent party from the irreparable damages which would flow from its breach? Such a doctrine might spring from iniquity. It would not be tolerated by equity. Her hand is never stayed when justice is within its grasp, nor her control relaxed while it can prevent irremediable loss from a breach of faith.

St Louis, Mo. HENRY W. BOND.

EQUITY—RIGHT TO ENJOIN CRIMINAL PROSECUTION.

DAVIS & FARNUM MFG. CO. v. CITY OF LOS ANGELES.

United States Circuit Court, S. D. California, April 3, 1902.

A court of equity is without jurisdiction to enjoin criminal prosecutions under a statute or ordinance alleged to be unconstitutional and void, even though it is also alleged that it is the purpose of such prosecutions to injure complainant in his property rights, and that such will be their effect.

WELLBORN, D. J.: Complainant at the commencement of this suit was erecting within the city of Los Angeles, for and under contract with another party, a water holder and gas tank, and filed its bill solely to enjoin threatened criminal prosecutions, under an ordinance of said city alleged to be invalid, against it employees for working on said structures, the purpose and effect of which prosecutions, the bill alleges, are to compel complainant to abandon said work, and thereby destroy or impair its vested property rights. The questions now presented for consideration relate to the equitable jurisdiction of this court, and the validity of said ordinance. These questions will be taken up in the order of their statement, because, if the jurisdiction did not exist, further inquiry concerning the ordinance is unnecessary.

The Supreme Court of the United States has said: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes and misdemeanors, or over the appointment or removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government. * * * The modern decisions in England by eminent equity judges concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. Attorney General v. Cleaver, 18 Ves. 211, 220; Turner v. Turner, 15 Jur. 218; Saull v. Browne, L. R. 10 Ch. 64; Kerr v. Preston Corp., 6 Ch. Div. 433. Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine. Story, Eq. Jur. § 893. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the state or under municipal ordinances. West v. Mayor, etc., 10 Paige, 539; Davis v. Society, 75 N. Y. 362; Tyler v. Hamersley, 44 Conn. 419, 422, 26 Am. Rep. 471; Stuart v. Board, 83 Ill. 341, 25 Am. Rep. 397; Devron v. First Municipality, 4 La. Ann. 11; Levy of City of Shreveport, 27

La. Ann. 620; Moses v. Mayor, etc., 52 Ala. 198; Gault v. Wallis, 53 Ga. 675; Phillips v. City of Stone Mountain, 61 Ga. 386; Cohen v. Goldsboro Comrs., 77 N. Car. 2; Waters-Pierce Oil Co. v. City of Little Rock, 39 Ark. 412; Spink v. Francis (C. C), 19 Fed. Rep. 670; *Id.* (C. C.) 20 Fed. Rep. 567; Suess v. Noble (C. C.), 31 Fed. Rep. 855." *Ex parte* Sawyer, 8 Sup. Ct. Rep. 482, 124 U. S. 200, 31 L. Ed. 402. To the same effect are the following cases: Suess v. Noble (C. C.), 31 Fed. Rep. 855; Hemsley v. Myers, and nine other cases, including M. Schandler Bottling Co. v. Welch (C. C.), 45 Fed. Rep. 283; Brewing Co. v. McGillivary (C. C.), 104 Fed. Rep. 272; Crighto v. Dahmer (Miss.), 13 South. Rep. 237, 21 L. R. A. 84, 35 Am. St. Rep. 666; City of Denver v. Beede (Colo. Sup.), 54 Pac. Rep. 624; Wardens of St. Peter's Episcopal Church v. Town of Washington (N. Car.), 13 S. E. Rep. 700; and City of Moultrie v. Patterson (Ga.), 34 S. E. Rep. 600.

The clear and positive declaration of law by the highest judicial tribunal of the land in *Ex parte* Sawyer, *supra*, is, without the other citations, determinative of the case at bar, since the prosecutions here sought to be enjoined are outside the exception to, and fully within the general rule enunciated in, the Sawyer case. Complainant, however, contends that said rule is further restricted to the extent indicated by the following excerpts: "Writers on equity jurisdiction properly say that the court of chancery does not deal with matters of crime, misdemeanors, offenses against prohibitory laws, nor questions of mere morality. But there is this reservation: that it is only when those matters are not connected with rights of property with respect to which the court has jurisdiction. Circumstances may confer a jurisdiction. Attorney General v. Cleaver, 18 Ves. 211; Macaulay v. Shackell, 1 Bligh (N. R.) 96. In Spinning Co. v. Riley, L. R. 6 Eq. 558, the vice-chancellor says: 'The jurisdiction of this court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate or tend to the ultimate destruction of property or to make it less valuable for use or occupation.'" Lottery Co. v. Fitzpatrick, 15 Fed. Cas. 984 (No. 8541). "Counsel urge that this bill does not show a cause of action cognizable in chancery against Mr. Wiltsie, the district attorney, since its purpose is to restrain him from instituting prosecutions under color of the amendment of 1897. But this complainant is seeking to protect a property right, and it seems to be law that when such prosecutions are threatened, under color of an invalid statute, for the purpose of compelling the relinquishment of a property right, the remedy in chancery is available." Central Trust Co. v. Citizens' St. R. Co. (C. C.), 80 Fed. Rep. 225. "'If the charge be of a criminal nature, or offense against the public, and does not touch the enjoyment of property, then a court of equity should not interpose by injunction.' On the other hand, where it is manifest, as in this case, that a prosecution and arrest is threatened for an alleged violation of city ordinances for the sole purpose of preventing the exercise of civil rights conferred directly by law, injunction is a proper remedy to prevent injury to the party thus menaced. * * *" City of Atlanta v. Gate City Gaslight Co., 71 Ga. 126. Besides the three cases last named, complainant also cites in support of its contention the following: Reagan v. Trust Co., 154 U. S. 388, 14 Sup. Ct. Rep. 1047, 38 L. Ed. 1014; Los Angeles City Water Co. v. City of Los Angeles (C. C.), 103 Fed. Rep. 711; M. Schandler Bottling Co. v. Welch (C. C.), 42 Fed. Rep. 531; City of Rushville v. Rushville Natural Gas Co. (Ind. Sup.), 28 N. E. Rep. 853, 15 L. R. A. 321; Spinning Co. v. Riley, L. R. 6 Eq. 558; City of Austin v. Austin City Cemetery Assn. (Tex. Sup.), 28 S. W. Rep. 528; Mayor, etc., v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Port of Mobile v. Louisville & N. R. Co. (Ala.), 4 South. Rep. 106, 15 Am. St. Rep. 342; Wood v. City of Brooklyn, 14 Barb. 425; and Iron Works v. French, 12 Abb. N. Cas. 466.

While it is not my purpose to examine in detail all of complainant's citations, brief references will be made to a few of them. The opinion in the Lottery case, *supra*, as shown by the above quotation therefrom, rests largely upon a principle of equity, well recognized, but which it seems to me, was inapplicable. The same is true of City of Atlanta v. Gate City Gaslight Co., *supra*, where the opinion quotes from Kerr on Injunctions the principle to which I refer, as follows: "'A court of equity,' says Kerr (Injunctions, 2), 'has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right of property. If a charge be of a criminal nature, or of an offense against the public peace, and does not touch the enjoyment of property, jurisdiction cannot be entertained. * * * But if an act which is also criminal touches also the enjoyment of property, the court has jurisdiction, but its interference is founded solely on the ground of injury to property.'" 71 Ga. 126. In City of Austin v. Austin City Cemetery Assn. (Tex. Sup.), 28 S. W. Rep. 529, the court discerns and states the inapplicability of the principle as follows: "Yet it has been held that 'the court will interfere to prevent acts amounting to crime, if they do not stop at crime, but also go to the destruction or deterioration of the value of property.' Spinning Co. v. Riley, L. R. 6 Eq. 551. This, however, does not assist us materially in the solution of the present question. It would seem clear that if a party could be enjoined from doing an act, not criminal in its nature, which is injurious to the property of another, he could also be enjoined if the act be one made punishable by law as a crime. The punishment of the criminal, when the act committed has injuriously affected the value of the property of another, does not repair the injury. The question under consideration arises upon quite a different case."

The principle of equity above stated, whose misapplication has led to erroneous conclusions, as I conceive, in some of the cases cited by complainant, means simply that the fact that a threatened act, if done, would be a crime, will not prevent a court from enjoining the commission of the act, where it would also be an invasion of complainant's property rights, and the other requisites to equitable relief concur. The case most frequently cited for this principle is Spinning Co. v. Riley, L. R. 6 Eq. 551, where, at page 558, the court, without reference to its facts, says: "The jurisdiction of this court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crimie or not, which go to the immediate, or tend to the ultimate, destruction of property, or to make it less valuable for use or occupation." This quotation, although so often otherwise assumed, has no reference whatever to criminal prosecutions, or even to civil suits; but the word "proceedings," therein employed, has an entirely different application, as clearly appears from the facts stated in the syllabus of the case, which is as follows: "The defendants, who were officers of a trades union, gave notice to workmen, by means of placards and advertisements, that they were not to hire themselves to the plaintiffs pending a dispute between the union and the plaintiffs. The bill prayed an injunction to restrain the issuing of the placards and advertisements, alleging that by means thereof the defendants had in fact intimidated and prevented workmen from hiring themselves to the plaintiffs, and that the plaintiffs were thereby prevented from continuing their business, and the value of their property was seriously injured and materially diminished. Held, upon demurrer, that the acts of the defendants, as alleged by the bill amounted to crime, and that the court would interfere by injunction to restrain such acts, inasmuch as they also tended to the destruction or deterioration of property." L. R. 6 Eq. 551. As a further abstract statement of the law concretely enunciated in said syllabus, substanially, however, to the same effect as the one above quoted, the court, at page 530, says: "The truth, I apprehend, is that the court will interfere to prevent acts amounting to a crime, if they do not stop at crime, but also go to the destruction or deterioration of the value of property." This rule has no connection with, or relation whatever to, the question of power of a court of equity to enjoin criminal prosecutions, and I am unable to accept as well reasoned any conclusion which results from confounding the two matters.

In Reagan v. Trust Co. neither the opinion of the court nor briefs of counsel discuss or in any way refer to the question last mentioned, and this, doubtless, for the reason that the proceedings there enjoined were not criminal prosecutions, but civil actions to recover statutory forfeitures and penalties; and moreover in that case there were other grounds for equitable relief. In Los Angeles City Water Co. v. City of Los Angeles, of the numerous authorities which the opinion cites concerning the remedy by injunction, not one touches the question of equitable cognizance over criminal prosecutions; and the inference is a fair one that it was not presented in argument, or specially considered by the court. Furthermore, there was jurisdiction in the case to enjoin civil suits for the forfeiture of complainant's property; and it was, no doubt, assumed by all the parties (whether correctly or otherwise need not now be considered) that the court having acquired jurisdiction for one would exercise it for all purposes.

In M. Schandler Bottling Co. v. Welsh (C. C.), 42 Fed. Rep. 531, on which complainant seems to place much reliance, the opinion by Philips, district judge, was filed July 18, 1890, on the granting of a temporary injunction. Afterwards, to-wit, February 18, 1891, the same case was heard on demurrer before Caldwell, circuit judge, when the demurrer was sustained, the temporary injunction was dissolved, and the bill dismissed for want of equity. 45 Fed. Rep. 283. On the first hearing the court said: "The remaining question not disposed of in that discussion is whether or not this suit is obnoxious to the objection that a court of equity never extends its jurisdiction to the enjoining of criminal proceedings. This is unquestionably a well-settled rule of equity jurisprudence. Kansas City Cable Co v. City of Kansas City, 29 Mo. App. 89, and *loc. cit.* This question underwent extended discussion in *Ex parte* Sawyer, 124 U. S. 200, 8 Sup. Ct. Rep. 482, 31 L. Ed. 492. Mr. Justice Gray, who delivered the majority opinion, said, *inter alia:* 'The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors. * * * To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, * * * is to invade the domain of the courts of common law.' Without stopping to consider whether this general rule is limited to criminal proceedings already begun in the court of criminal jurisdiction, it is sufficient to the matter in hand to say, as indicated in the quotation above made, that the rule has its exceptions. One of these is where a threatened criminal proceeding is hostile, vexatious, and unwarranted, and involves the wanton destruction of, or injury to, property interests of the accused, and especially so under circumstances where, permitted to proceed, the party injured would have no adequate remedy at law for restitution. Mr. Justice Gray recognizes this. He quotes from Sheridan v. Colvin, 78 Ill. 237: 'It is elementary law that the subject-matter of the jurisdiction of a court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in

matters purely criminal or merely immoral, which do not affect any right to property.' Again he says: 'No question of property is suggested in the allegations of matters of fact in the bill, or would be involved in any decree that the court could make thereon.'" 42 Fed. Rep. 533. On the latter hearing the court said: "The bill seeks to enjoin criminal proceedings. A court of equity possesses no such power. This principle is settled by the uniform current of authorities in England for two centuries, and in this country from the foundation of its jurisprudence. The recent emphatic reaffirmance of the doctrine by the Supreme Court of the United States renders it unnecessary to do more than repeat the rule in the language of the court."

Thus it will be seen that the latter decision, although not so in terms, is substantially a reversal of the former one. It will also be noted that the opinion on the first hearing, when the temporary injunction was granted, seeks to draw support from *Ex parte* Sawyer, by quoting certain expressions of Mr. Justice Gray with reference to property rights and civil rights. Obviously, however, these expressions were used by Mr. Justice Gray not to suggest a further exception, but merely to show that the facts of the case did not bring it within the exception embodied in his previous statement of the general doctrine, which I have already quoted, namely (the italics being mine): "The modern decisions in England by eminent equity judges concur in holding that a court of chancery has no power to restrain criminal proceedings, *unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.*"

This unambiguous and definite statement of the rule does not admit of any exception other than the one which it expressly allows. Besides, a careful examination of at least one of the authorities cited (Suess v. Noble [C. C.], 31 Fed. Rep. 855), shows that other exceptions could have been in the mind of the court. In the quotation which Mr. Justice Gray makes from the Illinois case of Sheridan v. Colvin, the phrase, "The court has no jurisdiction in matters purely criminal or merely immoral which do not affect any right to property," has no reference to criminal prosecutions, but was simply intended to declare that a court of equity would not interfere with acts merely on the ground of their immorality, or because they would, if committed, be crimes. So that the decision in *Ex parte* Sawyer, *supra*, whether we look solely to its text or the supporting authorities, is, as I have before stated, conclusive against complainant's contention.

In addition to what has already been said, it may be appropriately observed that municipal and state regulations of saloons, beer halls, theaters, and places of amusement generally, market places, slaughter houses, gas works, powder magazines, laundries, cemeteries, fire limits, streets (particularly obstructions, railway tracks, telegraph poles, pipe lines, etc., therein),—indeed, of all establishments, trades, and occupations subject to the police power of the state,—unavoidably affect property rights, and are usually rendered effective by making their violations punishable offenses. Now, if there were such jurisdiction as that for which complainant contends, every controversy over the validity of an ordinance or statute relating to any of the matters enumerated would furnish an occasion for interference by injunction; and thus would be presented the remarkable situation of courts of equity, state and federal, exercising supervisory power over the administration of a part, not inconsiderable, of the criminal laws of the country.

The jurisdiction asserted by complainant does not, in my opinion, exist, and for that reason the temporary injunction applied for will be refused.

NOTE.—*Right to Restrain Criminal Prosecutions—General Rule.*—The general rule is well settled that an injunction will not lie to restrain a criminal prosecution. Suess v. Noble, 31 Fed. Rep. 855; Chisholm v. Adams, 71 Tex. 678; *Ex parte* Sawyer, 124 U. S. 200; Garrison v. City of Atlanta, 68 Ga. 64; New Home Co. v. Fletcher, 44 Ark. 139. Thus an injunction will not be granted against the threatened arrest of plaintiff on the ground that keeping open his billiard saloon on Sunday is a violation of the Sunday Law, as plaintiff has an adequate remedy at law. So also equity will not enjoin a court martial from trying one subject to its jurisdiction, when he alleges as the only ground for relief that he has been tried on the same charge and that he apprehends that the second trial will be unfairly conducted. Perault v. Rand, 10 Hun, 222. Other cases illustrating the general rule may be mentioned as follows: Saull v. Browne, L. R. 19 Ch. 64; Atty. Gen. v. Cleaver, 18 Ves. Jr. 220; Predigested Food Co. v. McNeal (Sup. Ct. Cin.), 1 Ohio N. P. 266, 4 Ohio Dec. 356; Moses v. Mobile, 52 Ala. 208; Crighto v. Dahmer, 70 Miss. 602, 35 Am. St. Rep. 666; Washington R. R. v. District of Columbia, 6 Mackey, 570; Poyer v. Desplaines, 123 Ill. 111; O'Brien v. Harris, 105 Ga. 732; City of Denver v. Beede (Colo.), 54 Pac. Rep. 624. It would seem that the proper remedy for an illegal arrest is by *habeas corpus* or an action for damages, and not by injunction. Murphy v. Board of Police, 11 Abb. N. Cas. 377.

Enforcement of Municipal Police Regulations.—As a general rule, courts of equity cannot interfere to stay proceedings in criminal matters, or in any case not strictly of a civil nature, nor to arrest the authorities charged with the execution for criminal laws, whether the prosecution is for violation of state laws or for the infraction of municipal ordinances. In other words, equity has no jurisdiction to enjoin the prosecution of a suit for the violation of a municipal ordinance. Gault v. Wallis, 53 Ga. 675; Yates v. Village of Batavia, 79 Ill. 500. Thus an injunction will not lie to restrain a city and its authorities from enforcing by fine and imprisonment an ordinance requiring a license tax for public auctioneers, and providing that a violation thereof shall be punished by fine and imprisonment. Golden v. City of Guthrie, 3 Okla. 128, 41 Pac. Rep. 350. So, also, a court of equity has no jurisdiction to restrain a chief of the police and his officers from arresting the servants of plaintiff, a livery stable keeper, for alleged violations of an ordinance requiring hackney carriages to be numbered and their drivers to wear badges with corresponding numbers. McLaughlin v. Jones (Pa. 1876), 3 Wkly. N. Cas. 203.

A party, therefore, cannot enjoin the collection of a fine and costs, assessed for the violation of a city ordinance, on the ground that there was no offense charged; the remedy in such cases being by appeal. Schwab v. City of Madison, 49 Ind. 329. In a case from Kentucky, however, it was held that where plaintiff was arrested fifteen times under a city ordinance for occupying a highway, to which he claims title, and fined in each case an amount too small to allow an appeal, an injunction will lie to prevent any further prosecutions until the question of title is determined. Other authorities applying the rule to prosecutions under municipal ordinances are as follows: Pope v. Savannah, 74 Ga. 365; City Council v. L. & N. R. R., 84 Ala. 127; St. Peter's Church v. Washington, 109 N. Car. 21; Waters-Pierce Oil v. Little Rock, 39 Ark. 412; Ewing v. Webster City, 103 Iowa, 226; Hottinger v. New Orleans, 42 La. Ann. 629; Chicago R. R. v. Ottawa, 47 Ill. App. 73; affirmed 148 Ill. 397

Prior Proceedings Pending in Equity. — Justice Gray, in the case of *In re* Sawyer, 124 U. S. *loc. cit.* 221, says: "The modern decisions in England by eminent equity judges concur in holding that a court of chancery has no power to restrain criminal proceedings, *unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.*" This constitutes an exception well sustained by authority. Thus it has been held that a court of equity can interfere by an order with a party conducting a criminal proceeding whenever the parties sought to be enjoined have, as plaintiffs, submitted themselves to the court by a bill of equity as to the matter or right affected by or involved in the criminal proceeding. Spink v. Francis, 20 Fed. Rep. 567. But in such case the pursuer and pursued must be identical,—*i. e.*, the defendant in the bill and in the indictment must be the same person, and the person preferring the bill and the criminal charged must also be the same. Other authorities sustaining this exception are as follows: Wadley v. Blount, 65 Fed. Rep. 667; York v. Pilkington, 2 Atk. 302; Atty. Gen. v. Cleaver, 18 Ves. Jr. 211; Saul v. Browne, L. R. 10 Ch. 64.

Where Property Rights are Affected. — Equity is peculiarly a tribunal for the protection of property rights and in some instances has gone very far to make its authority felt in that direction. Whether, however, it will enjoin a criminal prosecution merely for the protection of property rights is not altogether clear. Some cases hold the affirmative side of this question. City Council v. L. & N. R. R., 84 Ala. 127; Shinkle v. City of Covington, 83 Ky. 420; Manhattan Iron Works Co. v. French (N. Y. 1882), 12 Abb. N. Cas. 446; Ryan v. Jacok (Ohio, 1881), 6 Wkly. Law Bull. 139. Thus in Manhattan Iron Works Co. v. French, *supra*, it was held that an injunction may issue to restrain the police authorities of a state from arresting the servants of a manufacturer engaged in continuing the business of manufacturing on Sunday, thereby stopping his entire business, when it appears that this cannnot be done without the destruction of property and irreparable loss and damage, even though the arrest is threatened under color of a state statute prohibiting work on Sunday except in case of necessity. Other authorities take the negative side of the question and assert a contrary rule. Crighto v. Dahmer, 70 Miss. 602, 13 South. Rep. 237, 21 L. R. A. 420; Davis v. American Society, 75 N. Y. 362; Predigested Food Co. v. McMeal (Ohio, 1895), 1 Ohio N. P. 266. Thus one who is threatened by an agent for the society for the prevention of cruelty to animals with arrest, cannot maintain an equitable action to enjoin the arrest, on the ground that it would damage his business; as, for instance, the slaughtering of hogs by a certain method. Davis v. American Society, *supra*. In the case of Predigested Food Co. v. McMeal, *supra*, it was squarely held that equity had no jurisdiction on the ground that complainant is innocent of charges about to be maliciously preferred in the criminal courts by officers acting under a valid law to enjoin their preferring and prosecuting the charges; and that it was immaterial that the prosecutions would affect property rights, and that the damages occasioned thereby might be irreparable. The rule supported by this latter class of authorities would claim to be in accord with the opinion in the case of *In re* Sawyer, 124 U. S. 200, where the court makes only one exception to the rule against equity interference in criminal prosecution, *i. e.*, the one already noticed, where proceedings are already pending in equity when the criminal prosecutions are instituted. In that case, however, three judges dissented, Justice Field expressing his dissent to the limitation of the rule thus announced as follows: "In many cases proceedings, criminal in their character, taken by individuals or organized bodies of men, tending, if carried out, to despoil one of his property or other rights, may be enjoined by a court of equity." We are inclined to favor this statement of the law and the rule announced by the first line of authorities mentioned under this subtopic. The true rule would seem to be that if the threatened arrest or prosecution would seriously affect or destroy property rights and impose damages which in their nature are irreparable, and not susceptible of being accurately estimated, equity would be justified in interfering by injunction.

Prosecutions Under Laws Alleged to be Invalid or Inapplicable.—Whether or not equity has the right to interfere with criminal prosecutions to protect property rights when based on statutes or ordinance whose validity or applicability is not questioned,—it is perfectly clear that where the statutes or ordinances which authorize the threatened prosecution are invalid or inapplicable to the facts in the particular case, equity may interfere and prevent such prosecutions by injunction. M. Schandler Bottling Co. v. Welch, 42 Fed Rep. 561; Platte & D. Canal & Milling Co. v. Lee, 2 Colo. App. 184, 29 Pac. Rep. 1036; City of Rushville v. Gas Co., 132 Ind. 575, 28 N. E. Rep. 853, 15 L. R. A. 321; Hall v. Schultz (N. Y.), 31 How. Pr. 331; Central Trust Co. v. R. R., 80 Fed. Rep. 225; Austin v. Cemetery Assn., 87 Tex. 330; Atlanta v. Gaslight Co., 71 Ga. 107; Mobile v. Railroad, 84 Ala. 116, 5 Am. St. Rep. 342. Authorities holding *contra:* Cohen v. Commissioners of Goldsboro, 77 N. Car. 2; Wollack v. Society, 67 N. Y. 23; Poyer v. Village of Desplaines, 123 Ill. 11, 13 N. E. Rep. 819, 5 Am. St. Rep. 494; Burnett v. Craig, 30 Ala. 135, 68 Am. Dec. 115; Skakel v. Roche, 27 Ill. App. 423. In Schandler Bottling Co. v. Welch, *supra*, it was held that though a court of equity has no jurisdiction to enjoin a purely criminal proceeding, an injunction will lie against proceedings by a prosecuting attorney to prevent the sale of intoxicating liquors in the original packages in which they were imported under a state law which, in so far as it prohibits such sales, is in violation of the interestate commerce clause of the federal constitution, since such proceedings are an interference with complainant's property rights. On almost the identical statement of facts the court, in the case of Hemsley v. Meyers, 45 Fed. Rep. 283, reached an absolutely contrary conclusion. In that

case complainants were engaged in the sale of liquors in the original packages. They alleged in their bill for injunction that criminal proceedings had been instituted under the laws of Kansas seeking to break up their business in violation of their rights under the federal constitution. The court held that the proceedings instituted by defendants being criminal in their nature, a court of equity had no jurisdiction to restrain them by injunction. Some of the cases which deny the rule supported by the weight of authority do so only to the extent of saying that the invalidity of a statute authorizing a criminal proceeding will not give equity the right to interfere by injunction unless such invalidity has been determined in a previous action. Wollack v. Society, 67 N. Y. 23; Poyer v. Village of Desplaines, 123 Ill. 111, 13 N. E. Rep. 819, 5 Am. St. Rep. 494.

JETSAM AND FLOTSAM.

ALTERATION OF CONTRACTS.

There is always power in parties to alter a contract they may have entered into, but it is not always clear what the effect of such alteration may be. It may be that the alteration has the effect of creating a new contract and rescinding or discharging the old contract; or it may be that it will only vary the terms of the old contract so far as indicated by the alteration, all the other terms of the contract standing as if no alteration of any kind had been introduced. In other words, the subsequent agreement may affect parts only of the former contract, leaving the original contract in other respects to stand; and consequently the new agreement may have to be construed with reference to the original contract; and so far as the later agreement is inconsistent with the former contract, it must be taken to rescind it.

This is well illustrated in Carr v. Wallachian Petroleum Company (1866), L. R. 1 C. P. 637. There the defendants chartered two vessels of 300 tons each for a voyage from Ibralia to London with full cargoes of petroleum at 84*s.* per ton. In consequence of their stores at Ibralia having been destroyed by fire, they were unable to furnish any oil, and the owners agreed to cancel the charter-parties, and to procure other cargoes upon the defendants guaranteeing each vessel a "sum of 900*l.* gross freight home." The homeward cargoes shipped under the substituted contracts fell short of the guaranteed sum for each vessel by 343*l.* 6*s.* One of the vessels arrived in safety, and the other was lost. It was held by the court of common pleas that the contract was broken at the moment of the shipment of the homeward cargo, and consequently that the owners were entitled to recover the deficiency in respect of each vessel, notwithstanding the loss of one. Erle, L. C. J., said: "The question turns upon the meaning of the memorandum by which the defendants guaranteed to each of the two vessels a freight home of 900*l.* gross. This was a substituted contract, and is to be construed with reference to the original charter-party. That assumes the capacity of each vessel to be 300 tons, and provides for a freight of 84*s.* per ton. The owners stipulate for a full cargo of petroleum. In consequence of a misfortune at the contemplated place of shipment, the charterers were unable to supply any cargo. A new contract was thereupon substituted under which the owners were to take any other cargo they could procure, the defendants guaranteeing that they should at least receive 900*l.* gross freight for each vessel. If the original contract had been still subsisting, and the defendants had only put on board each vessel 150 tons of petroleum instead of 300 tons, the contract would have been broken at that time. So the gross amount of freight on the cargoes at Kilia falling short of the guarantee sum, the contract was broken at the port of shipment." This extract well illustrates the effect of an alteration of this kind.

We have said that so far as the later agreement is inconsistent with the former contract it must be taken to rescind it. On this point reference may be made to the case of Patmore v. Colbourne (1834), 1 C. M. & R. 65. There it appeared on the 28th of May A entered into an agreement with B for twelve months for the performance of various literary labors, to be thereafter indicated by B, A to receive from B for such literary labors the sum of six guineas a week, and not to engage during the twelve months in any publication similar to the one of which B was the proprietor. On the 14th of October in the same year a new agreement was entered into by the parties, in which A agreed to edit the *Court Journal* and to devote all his time and attention to the same, except the hours he had already engaged to devote to the superintending of a publication with which B was not connected, at a salary of 10*l.* per week. It was held that the second agreement superseded the first, and that A could not recover the six guineas per week for the remainder of the twelve months after the second agreement came into operation.

Likewise in Sanderson v. Graves (1875), L. R. 10 Ex. 234. In that case the plaintiffs entered into an agreement in writing with the defendant to let him a public house as tenant from year to year, with the option on his part to call on them to grant him a lease of the house for twenty-eight years upon the terms, amongst others, that if he sold such lease for more than 1,200*l.* he should give the plaintiffs half the difference. The plaintiffs having granted him a lease of this house, which he sold for 2,500*l.*, brought an action against him upon the agreement to recover one-half of 1,300*l.* The defendant contended that the lease to him was granted under a substituted agreement, which was not in writing so as to satisfy the statute of frauds. The lease granted differed from that specified in the written agreement in the following particulars: The term was for thirty-two years instead of twenty-eight. The rent was 105*l.* instead of 100*l.* The premium was 800*l.* instead of 1,200*l.* There was also no covenant against assignment without the lessor's consent, nor one binding the lessee to take his beer from the plaintiffs, as in the original agreement. These differences were the result of objections by the defendant yielded to by the plaintiffs, who on their part required the additional rent. The jury found, however, that the stipulation as to dividing the profit remained in force or was renewed. The court held that the defendant was entitled to judgment, as there was a new agreement, which ought to have been in writing to satisfy the statute of frauds.

There are the well-known cases of building contracts; where, for example, a contract was made for a building to be completed by a fixed day under penalties for delay, a subsequent agreement for additional work which rendered it impossible to complete within the time was held to operate as a waiver of the former stipulation as to time and to discharge the penalties. Thornhill v. Neats, 6 C. B. (N. S.), 831, and Jones v. St. John's College L. R. 6 Q. B. 115. The latter case it will be recollected that the unfortunate builder contracted to do certain works within a fixed time including alterations which might be ordered under the contract, and he was held liable for not completing

within the time, although alterations ordered without allowing an extension of time rendered performance within the time impossible.

The case of Frith v. Midland Railway Company, L. R. 20 Eq. 100, was the case of a substituted contract rendered impossible of performance. A landowner through whose land a railway company proposed to pass agreed, in May, 1864, to withdraw his opposition to their bill on the terms that the company would vary the course of their line and make certain bridges, works and approaches. The company gave a notice to treat, and on the 20th of March, 1867, they went into possession. On the 27th of May, a further agreement was come to that the company should pay 2,250*l*. for purchase money and compensation and should construct the bridges askew according to an agreed plan. The company constructed the line as agreed upon, but did not complete the works, nor pay the purchase money nor the interest, though completion of the works was demanded in July, 1868, and payment of interest in December, 1868.

On the 6th of February 1869, a substituted agreement was made between the landowner and the company whereby it was agreed that an estimate should be made by the company's engineer of the cost of completing the road, and submitted to A, the landowner's agent, "for approval;" in case of difference the amount to be disbursed by B, the amount "when agreed or determined" to be paid to the landowner "in discharge of all obligations" as to the road, and "the purchase to be complete forthwith." In December, 1871, A died, and in May, 1872, the company for the first time sent in an estimate for the cost of completing the road. The purchase had not been completed, and neither the purchase money nor any interest had been paid. The court took the view that the the submission of the estimate to A for approval was of the essence of the agreement of the 6th February, 1869, and that inasmuch as by his death the agreement was incapable of being performed in the manner and form therein specified, they would not enforce performance of it.

The subsequent agreement may operate as a conditional discharge of the original agreement, so that, the later agreement failing, the former contract is restored to its full effect. Thus, the acceptance of a new lease by a tenant operates as a surrender in law of his existing lease; but which is conditional upon the new lease being valid. *Per cur.* Wilson v. Sewell, 4 Burr. 1980.—*Justice of the Peace.*

BOOK REVIEWS.

DRESSER ON EMPLOYERS' LIABILITY.

That branch of the law of master and servant which treats of the liability of the master for injuries to the servant while in his employment, embraces within itself the most litigated questions of law. So great and burdensome indeed has become the mass of litigation on these questions that the English parliament and the legislatures of five states, New York, Massachusetts, Indiana, Alabama and Colorado, have endeavored to somewhat codify and determine finally the chief points of controversy by the passage of what is generally known as the Employers' Liability Acts. The point of greatest difficulty—the fellow-servant doctrine—has been determined more fairly in favor of the servant. The attempt has been made in this book to state briefly the effect of the application of this system of legislation during the fifteen years of its adoption into this country. Considerable space has also been devoted to an analysis of the defense of assumption of risk, which, next to the fellow-servant doctrine, is the most controverted question in this branch of the law. The volume shows careful preparation and exhaustive research, and in the states which have adopted this system of legislation, should become the leading and indispensable authority in the effort to interpret and apply its various provisions. Printed in one volume of 881 pages, and published by Keefe-Davidson Company, St. Paul, Minn.

BOOKS RECEIVED.

Studies in Juridical Law, By Horace E. Smith, LL.D. For a Period of Ten Years Dean and a Daily Lecturer of the Albany Law School. Chicago, T. H. Flood and Company, 1902. Sheep, pp. 359. Price, $3.50. Review will follow.

Elements of the Law of Real Property, with leading and illustrative cases. By Grant Newell, Professor of the Law of Real Property in the Chicago-Kent College of Law. (Law Department of Lake Forest University.) Chicago, T. H. Flood and Company, 1902. Sheep, pp. 438. Price, $4.00. Review will follow.

HUMORS OF THE LAW.

An Iowa young man recently proposed marriage to a young woman, but hearing that she had false hair, he declined to fulfill his engagement. She brought suit against him for breach of promise, but was nonsuited on the ground that she had won the young man's affections under false pretenses.

An honored correspondent from Minnesota sends us the following which might well be entitled "The Client's Revenge."

A Fillmore county attorney (Minnesota), after long and industrious practice of his profession, finally secured a competence and began to indulge in a country-seat where he installed a collection of blooded animals. Having bought a fancy calf at some distance from home, he hired a former client to take charge of the animal and forward it to its destination.

The calf finally arrived and with it an itemized bill, viz.,

To building crate,	$ .75
To pursuing calf,	.50
To catching the same,	.50
To inserting same in crate,	1.00
To attempting to prevent to escape,	.75
To running around after calf,	1.50
To capturing same,	2.00
Costs,	
To attendance one day,	3.00
To return of calf,	.50
Please remit	$10.50

The attorney suspected immediately that the employed had at some time been in receipt of an itemized statement from some member of the legal fraternity.

A case was being tried in a county court. A horse had been stolen from a field, and the evidence all pointed to a certain doubtful character of the neighborhood as the culprit. Though his guilt seemed clear he had found a lawyer to undertake his defense. At the trial the defendant's counsel expended his energy in trying to confuse and frighten the opposing witnesses, especially a farmer whose testimony was particularly damaging. The lawyer kept up a fire of questions, asking many foolish ones, and repeating

himself again and again in the hope of decoying the witness into a contradiction.

"You say," the lawyer went on, "that you can swear to having seen this man drive a horse past your farm on the day in question?"

"I can," replied the witness, wearily, for he had already answered the question a dozen times.

"What time was this?"

"I told you it was about the middle of the forenoon."

"But I don't want any 'abouts' or 'middles.' I want you to tell the jury exactly the time."

"Why," said the farmer, "I don't always carry a gold watch with me when I'm digging potatoes."

"But you have a clock in the house, haven't you?"

"Yes."

"Well, what time was it by that?"

"Why, by that clock it was just 19 minutes past 10."

"You were in the field all the morning?" went on the lawyer, smiling suggestively.

"I was."

"How far from the house is this field?"

"About half a mile."

"You swear, do you, that by the clock in your house it was just 19 minutes past 10?"

"I do."

The lawyer paused and looked triumphantly at the jury. At last he had entrapped the witness into a contradictory statement that would greatly weaken his evidence.

The farmer leisurely picked up his hat and started to leave the witness stand. Then, turning slowly, he added:

"I ought, perhaps, to say that too much reliance should not be placed on that clock as it got out of gear about six months ago, and it has been 19 minutes past 10 ever since."—*Cincinnati Commercial Tribune.*

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCORD AND SATISFACTION—Action for Wages Due.—Checks issued by employer, payable in merchandise for wages due, held no bar to an action for the money due as wages.—Martin-Alexander Lumber Co. v. Johnson, Ark., 66 S. W. Rep. 924.

2. ADVERSE POSSESSION—Dedicating of Street.—Where a city accepts a dedication of a street, an abutting owner cannot acquire a portion of the street by adverse possession.—Shirk v. City of Chicago, Ill., 63 N. E. Rep 193.

3. ADVERSE POSSESSION — Evidence. — Proof of the prior possession of real estate being sufficient to sustain trespass to try title as against a mere trespasser, error assigned in the admission of evidence concerning plaintiff's title will not be considered on appeal.—Mumme v. McCloskey, Tex., 66 S. W. Rep. 853.

4 ADVERSE POSSESSION Sale by Heirs.—Where a portion of the heirs sold their interests in the land inherited, the possession of the purchaser was not adverse to the other heirs or to the widow's claim to dower.—Sergent v. North Cumberland Mfg. Co., Ky., 66 S. W. Rep. 1036.

5. APPEAL AND ERROR—Assignment of Error.—Where an assignment of error assails several conclusions of law jointly, and one of them is correct, the correctness of the others is not presented for decision.—Chicago, I. & L. Ry. Co. v. State, Ind., 63 N. E. Rep. 224.

6. APPEAL AND ERROR—Court of Claims.—Finality of judgment of court of claims cannot be contested by defendant because of the filing of amended findings of fact at his own request in connection with a motion for rehearing.—United States v. St. Louis & M. V. Transp. Co., U. S. S. C., 22 Sup. Ct. Rep. 350.

7. APPEAL AND ERROR—Defective Brief.—That a brief of error is so defective that it cannot be considered is not ground for dismissing the writ of error.—Fleming v. Roberts, Ga., 40 S. E Rep. 792.

8. APPEAL AND ERROR—Demurrer to Amended Bill.—Code, § 3454, does not authorize an appeal from an order sustaining a demurrer to an amended bill, on the ground that it makes a new case, in a cause in which the original action may be proceeded with, as if the amendment had not been filed.—Hobson v. Hobson, Va., 40 S. E. Rep. 899.

9. APPEAL AND ERROR—Evidence.—Where there is competent and admissible evidence in an equity suit sufficient to sustain the decree, it will not be reversed by reason of the admission of improper evidence.—Shirk v. City of Chicago, Ill., 63 N. E. Rep. 193.

10. APPEAL AND ERROR—Findings of Fact. Findings of fact on motion to open a judgment cannot be reviewed, unless there is an abuse of discretion.—McMahon v. Pugh, S. Car., 40 S. E. Rep. 961.

11. APPEAL AND ERROR—Form of Judgment.—An objection to the form of a judgment appealed from as it appears in the record is cured, where an amended record, showing the judgment in proper form, duly certified by the clerk of the trial court, is filed.—Carrington v. People, Ill., 63 N. E. Rep. 163.

12. APPEAL AND ERROR—Illegal Claim.—The supreme court will not pass on questions when an adjudication, though favorable to plaintiff in error could not practically benefit him.—Benton v. Singleton, Ga , 40 S. E. Rep. 811.

13. APPEAL AND ERROR—Inspection of Records.—The court of appeals may, of its own motion or at the suggestion of counsel, inspect the records and make use of the information thus gained in a pending cause.—Mississinewa Mon. Co. v. Andrews, Ind., 63 N. E Rep. 231.

14. APPEAL AND ERROR—Instructions.—Where there is no complaint of the court's failure to construe a written contract, or as to the admission of parol evidence, the case will be dealt with as if the evidence had shown the contract.—Walters v. Americus Jewelry & Music Co., Ga , 40 S E Rep. 803.

15. APPEAL AND ERROR—Proper Parties.—It is too late to contend on appeal that plaintiff, sued as trustee, was not a proper party to the suit because he had no real interest therein.—Hadley v. Bryan, Ark , 66 S. W. Rep. 921.

16. APPEAL AND ERROR—Refusal to File Conclusions.—In order to have the action of a trial judge reviewed

for a refusal to file conclusions, a bill of exceptions should be taken.—Wentz v. Wentz, Tex., 66 S. W. Rep. 869.

17. ASSIGNMENT — Defenses. — Mortgagor held not estopped from pleading against an assignee of the bonds any defense which she had and might have used against mortgagee before notice of the assignment.—Murray v. Duffy, Ky., 66 S W. Rep. 1038.

18. ASSIGNMENT FOR BENEFIT OF CREDITORS—Burden of Proof.—The burden of proof rests upon the party against whom judgment would go if no evidence were offered.—Mann v. Alves, Ky., 66 S. W. Rep. 1011.

19. ATTACHMENT — Attachable Interest. — Where advancements have been made to an heir by the administrator, which were accepted in full of his share, the heir has not thereafter an attachable interest in the real estate of the deceased —Security Inv. Co. v. Lottridge, Neb., 89 N. W. Rep. 298.

20. ATTORNEY AND CLIENT—Lien.—Where attorneys file a claim for lien, on a judgment, it cannot be set off against another judgment, unless the lien is protected. —Finney v. Gallop, Neb., 89 N. W. Rep. 276.

21. ATTORNEY AND CLIENT—Unauthorized Services.—An attorney cannot recover for services in preparing and filing a brief, where he was not employed to do so, and there is nothing to show that he did it with defendant's knowledge or consent —Duckwall v. Williams, Ind., 63 N. E. Rep 232.

22. BAIL—Construction.—A recognizance conditioned that defendant shall appear on the first day of the next term of the court, and not depart without leave, and abide the order of the court, is limited to the term at which it exacts its appearance.—Hesselgrave v. State, Neb., 89 N. W. Rep. 295.

23. BANKRUPTCY — Alimony. — A decree for alimony against a bankrupt, entered before proceedings in bankruptcy, held not discharged by his bankruptcy.—Welty v. Welty, Ill., 63 N. E. Rep. 161.

24. BANKS AND BANKING—Knowledge of Insolvency.—On a prosecution under Starr & C. Ann St. ch. 38, § 168, providing for the punishment of an officer of a bank receiving deposits when it is insolvent, accused should have been allowed to testify as to his belief that the bank was solvent.—Paulsen v. People, Ill , 63 N. E. Rep. 144.

25. BENEFIT SOCIETIES - Designation of Beneficiary.—A will held not "a testamentary disposition," required by mutual benefit association to designate beneficiary. —Kunkel v. Workmen's Sick & Death Ben. Fund, 75 N. Y. Supp. 188.

26. BENEFIT SOCIETIES — Criticising Officers. — Distribution of circulars by member of benefit society, criticising officers, held not a breach of provisions in constitution forbidding public attacks on officers of the society. Gleiforst v. Workingmen's Sick & Death Ben. Fund, 75 N. Y. Supp. 44.

27. BENEFIT SOCIETIES — Reasonable Regulations. — Where a new member is not entitled to benefits for six months, a law that a suspended member shall not be entitled to benefits for six months after reinstatement is not unreasonable. Hart v. Adams' Cylinder & Web Press Printers' Assn., 75 N. Y. Supp. 110.

28. BENEFIT SOCIETIES—Waiver of Forfeiture.- That a beneficiary insurance association continues to collect dues and assessments from a member who has forfeited his certificate after knowledge of such forfeiture held a waiver of such forfeiture.—Modern Woodmen of America v. Coleman, Neb., 89 N. W. Rep. 641.

29. BONDS Consideration.—The fact that there was no consideration to a surety for the execution of a penal bond under seal is no defense to an action thereon; the provisions of Rev. St. 1874, ch. 98, § 9, having no application to such bonds. Chicago Sash, Door & Blind Mfg. Co. v. Haven, Ill , 63 N. E. Rep. 158.

30. CARRIERS - Authority of Agent.—In an action to recover difference between freight charged by connecting carrier and the amount which receiving carrier's agent stated would be charged, a general denial held to raise issue as to whether receiving carrier was bound by agent's statements. — McLagan v. Chicago & N. W Ry. Co , Iowa, 89 N. W. Rep. 233.

31. CARRIERS—Contract.—Presumption indulged that, when shipper applied to defendant railroad company's agent for a car to ship his stock, he anticipated shipping under the usual contract, so as to exclude idea of fraud or mistake.—Richmond, N., I. & B. R. Co. v. Richardson, Ky., 66 S. W. Rep. 1035.

32. CARRIERS — Fire Caused by Sparks. — Question whether cotton stored in open sheds in close proximity to railroad tracks was set on fire by sparks from locomotive held one for the jury.—Marande v. Texas & P Ry. Co., U. S. S. C., 22 Sup. Ct. Rep. 340.

33. CARRIERS—Announcing Stations.—A railroad company held not negligent as a matter of law in failing to announce on its trains their arrival at stations. Houston & T. C. Ry. Co. v. Goodyear, Tex., 66 S. W. Rep. 962.

34. CARRIERS — Gratuitous Passengers. — Where one who was permitted to ride on a freight train as a mere matter of accommodation was thrown while leaving it as it moved rapidly, the railroad company held not liable for his death resulting therefrom.—Peak's Admr. v. Louisville & N. R. Co., Ky., 66 S. W. Rep. 995.

35. CARRIERS—Standing on Platform.- In an action against a railway for injuries to a passenger, requested instructions assuming that it was negligence for a passenger to stand on the platform of a moving train and violate a rule of the company were incorrect,—St. Louis S. W. Ry. Co. of Texas v. Ball, Tex., 66 S. W. Rep. 879.

36. CHATTEL MORTGAGES—Chattels Removed to Another State. A mortgagee's lien on personalty follows the mortgaged property into another state, to which it is removed without his knowledge or consent.—Blythe v. Crump, Tex., 66 S. W. Rep. 885.

37. CHATTEL MORTGAGES — Rights of Innocent Purchaser.—An innocent purchaser of personalty incumbered by a mortgage takes title subject to the lien, where the mortgagees are not negligent in respect to giving notice. Bylthe v. Crump. Tex., 66 S. W. Rep. 885.

38. COLLISION—Improper Anchorage.—Anchoring vessels of the United States in an improper position in a harbor, in disregard of the regulations of the port requiring notice to the harbor master of the intention to anchor, constitutes negligence, rendering the United States liable for damages caused to other vessels navigating the harbor.- United States v. St. Louis & M. V. Transp. Co., U. S. S. C., 22 Sup. Ct Rep. 350.

39. CONSTITUTIONAL LAW — Exemptions.—An act exempting certain portions of a county from the operation of the general stock law is unconstitutional.—Goodale v. Sowell, S. Car., 40 S. W. Rep. 970.

40. CONSTITUTIONAL LAW—Statutes.—Act Cal. March 15, 1883, as amended March 1, 1893, authorizing all cities except those of the first class to refund outstanding bonds of indebtedness, held not unconstitutional, as special legislation.- Waite v. City of Santa Cruz, U. S. S. C., 22 Sup. Ct. Rep. 327.

41. CONTEMPT Punishment. — A referee, on fining a witness for contempt for refusing to testify, cannot, under Code Civ. Proc. § 2284, fine him $250 and the costs of all the proceedings theretofore had.—*In re* Husted's Estate, 75 N. Y. Supp. 253.

42. CONTRACTS—Action for Full Performance.—Under a complaint to recover for full performance of a contract, proof of matters excusing or waiving it are inadmissible, and recovery cannot be had on that theory.—Tribune Assn. v. Eisner & Mendelson Co., 75 N. Y. Supp. 100.

43. CONTRACTS - Quantum Meruit.—Where an express contract for advertising was mutally abandoned without reservation, recovery may be had for advertising done on a *quantum meruit*.- Tribune Assn. v. Eisner & Mendelson Co., 75 N. Y. Supp. 100.

44. CONTRIBUTION — Prior Incumbrance. — Vendee o

land held not entitled to recover of the vendor because of the sale of land for taxes which were a prior incumbrance. Hancock v. Wiggins, Ind., 63 N. E. Rep. 242.

45. CORPORATIONS—Action on a Note.—Burden of proof held to be upon plaintiff, in an action upon a note signed on behalf of a corporrtion by the president thereof, to show that the corporation had assumed the payment of the note.—Wilson v. Tyler Coffin Co., Tex., 66 S. W. Rep. 865.

46. CORPORATIONS—Trade-Name.—A trade-name, consisting simply of a generic term, will not be protected.—Industrial Mutual Deposit Co. v. Central Mutual Deposit Co., Ky., 66 S. W. Rep. 1032.

47. COUNTIES—Failure to Levy Sufficient Tax. — The duty imposed upon county commissioners under Comp. St. ch. 79, subd. 2, § 11, of levying the tax voted by a school district meeting, held a public duty only; and where they by mistake levy a less tax than voted, they are not personally liable to the school district. School Dist. No. 80 of Nemaha County v. Burress, Neb., 89 N W. Rep. 609.

48. COURTS—Jurisdiction.—In an action by an administrator *de bonis non* to recover building stock from the executor of the former administrator, courts of the state in which the building association was located held to have jurisdiction.—Michigan Trust Co. v. Probasco, Ind., 63 N. E. Rep. 255.

49. COURTS—Jurisdiction.—In the absence of an affirmative showing, a court of general jurisdiction will be conclusively presumed to have jurisdiction of the parties to the action.—Nehawka Bank v. Ingersoll, Neb., 89 N. W. Rep. 618.

50. COURTS—Question Certified to Supreme Court.—Under Const. § 6, amendment of 1884, a case cannot be certified by the court of appeals to the supreme court, when only a single point therein is decided, but only after a decision of the case.—Gipson v. Powell, Mo., 66 S. W Rep. 969.

51. COURTS—Writ of Error from City Court.—The city court of Americus, which, under Acts 1900, p. 93, is provided with a trial jury of only six persons, is not the kind of a city court which can grant new trials under the constitution, and from which writs of error lie to the supreme court.—Monford v. State, Ga., 40 S. E. Rep. 798.

52. CRIMINAL EVIDENCE—Refusal to Assist in Discovery of Criminal. Evidence that, either when called on the next morning after prosecutrix was shot, or without being called on, accused refused without apparent reason to help witnesses hunt for tracks of the guilty person, or to assist them in searching for evidence, was material.—Baines v. State, Tex., 66 S. W. Rep. 847.

53. CRIMINAL EVIDENCE—Res Gestæ.—On a prosecution for felonious shooting, evidence of the cries of the prosecutor, immediately after being shot, that defendant had shot him, held admissible to prove defendant's identity.—Andrews v. Commonwealth, Va., 40 S. E. Rep 935.

54. CRIMINAL LAW—Former Jeopardy.—A former trial wherein the proceedings were void because of the disqualification of the judge, will not support a plea of former jeopardy. - *Ex parte* Graham, Tex., 66 S. W. Rep. 840.

55. CRIMINAL TRIAL—Cautionary Instruction. — Evidence corroborating the testimony of an accomplice held sufficient to authorize a refusal of a cautionary instruction as to the weight to be given the uncorroborated testimony of an accomplice.—State v. Koplan, Mo., 66 S. W. Rep. 967.

56. CRIMINAL TRIAL—Excessive Fines.—A fine of $1,000 in an assault and battery case held not to be a violation of a clause of the bill of rights prohibiting the imposition of excessive fines, even though the maximum fine in certain other criminal cases of grave character was limited by statute to $500.—Doyle v. Commonwealth, Va., 40 S. E. Rep. 925.

57. CRIMINAL TRIAL—Forced to Trial Without Counsel. —Where one indicted for a crime was, immediately after the appointment of counsel, forced to trial without giving such counsel an opportunity to prepare for the defense, it is cause for new trial.—McArver v. State, Ga., 40 S. E. Rep. 779.

58. CRIMINAL TRIAL—Statement to Jury. — Where the county attorney read to the jury the indictment and the indorsements thereon, whereupon the attorney for the commonwealth said to the jury the indictment was his statement, no further statement to the jury was necessary. — Hinkle v. Commonwealth, Ky., 66 S. W. Rep. 1020.

59. CURTESY—Validity of Statute. — Where no child has been born of a marriage when Act of March 15, 1894, regulating the property rights of husband and wife took effect, the husband had no vested right to an estate by curtesy, and that statute is valid as to him to the extent that it abolishes such right, though a child thereafter was born of the marriage.—Phillips v. Farley, Ky., 66 S. W. Rep. 1006.

60. DAMAGES—Aggravated Injuries. — An aggravated condition of plaintiff's injuries, caused by her failure to follow the instructions of her physician, does not constitute an element of damages in an action for the original injuries. — Zibbell v. City of Grand Rapids, Mich., 89 N. W. Rep. 563.

61. DAMAGES - Excessive. — A verdict for $450 for an assault by a man upon a boy 12 years of age in a public park in the presence of others held not so excessive as to indicate passion or prejudice.—Hollins v. Gorham, Ky., 66 S. W. Rep. 823.

62. DAMAGES—Exemplary Damages.—A declaration in an action against a bank for wrongful dishonor of a check held to entitle plaintiff to prove exemplary damages.—Wood v. American Nat. Bank, Va., 40 S. E. Rep. 931.

63. DAMAGES — Exemplary Damages. — Exemplary damages are allowable only where there is malice or such reckless negligence as evinces a conscious disregard of the rights of others.—Wood v. American Nat. Bank, Va., 40 S. E. Rep. 931.

64. DAMAGES—Hysteria.—In an action for injuries, an instruction not to award plaintiff any damages for hysteria not directly caused by the accident held properly refused.—Metropolitan St. Ry Co. v. Hudson, U. S. C. C. of App., Second Circuit, 113 Fed. Rep 449.

65. DAMAGES — Increase of Animals. — Gains arising from the probable increase of flock of sheep and the propable clip are not so uncertain as to prevent proof of probable amount by experts in an action for breach of contract.—Schrandt v. Young, Neb., 89 N. W. Rep. 607.

66. DAMAGES—Instructions.—In an action for personal injuries, an instruction should be given on the proper measure of plaintiff's damages, in case he should prevail.—Carpenter v. City of Red Cloud, Neb., 89 N. W. Rep. 637.

67. DEATH - Life Tables as Evidence.—In an action for wrongful death the Carlisle Tables of expectancy of life are admissible.—Chicago, R. I. & P. R. Co. v. Hambel, Neb., 89 N. W. Rep. 643.

68. DEATH—Proximate Cause.—Charge, in an action against a railroad for death resulting from the derailment of a train, to find for defendant, unless the gangrenous condition causing death resulted from an injury caused by such derailment, held properly given.—Johnson v. Galveston, H. & N. Ry. Co., Tex., 66 S. W. Rep. 905.

69. DEATH—Right of Action.—Under Sand. & H. Dig. §§ 5051, 5058, right of action held not to exist in next of kin of person under 14 years of age for damages for the death of such person while employed in a coal mine.—Kansas & T. Coal Co. v. Gabsky, Ark., 66 S. W. Rep. 915.

70. DEDICATION—Evidence.—Resolutions of the common council of C, directing that a portion of a street be inclosed as a public park, etc., held evidence of an acceptance of the dedication of the entire street, includ-

ing the portion set aside as a park.—Shirk v. City of Chicago, Ill., 63 N. E. Rep. 193.

71. DEEDS — Construction. — A conveyance granting realty to grantee, her heirs and assigns, *habendum* to grantee, during her natural life only, with remainder in fee to surviving heirs, held to convey grantee only a life estate. — Wilson v. Terry, Mich , 89 N. W. Rep. 566.

72. DEEDS - Escrow —Delivery of deed in escrow held not violative of a provision that the deed should not be delivered until the death of the grantors. — Meech v. Wilder, Mich., 89 N. W. Rep. 556.

73. DETINUE — Property of Office. — An action of detinue is not the proper remedy for the recovery by public officers of property pertaining to their office and withheld by their predecessors.—Sinclair v. Young, Va., 40 S. E. Rep. 907.

74. DISCOVERY Failure to Produce Papers. — Before judgment can be entered for failure to produce books or papers in accordance with a notice served as provided by Civ. Code, § 3250, it is necessary that there should be a peremptory written order by the judge, entered on the minutes, requiring the party to produce the same within a reasonable time. — Marshall v. McNeal, Ga., 40 S. E. Rep. 796.

75. DISTRICT AND PROSECUTING ATTORNEYS—Recovery for Service. — Under Acts 1899, p. 352, § 27, an attorney appointed by the circuit court to assist the prosecuting attorney in the prosecution of a murder case therein cannot recover from the county for his services where, at the time he was appointed and rendered the services, there was no existing appropriation for payment therefor.—Turner v. Board of Comrs. of Elkhart County, Ind., 63 N. E. Rep. 210.

76. DIVORCE Alimony.—A decree in an action for divorce that defendant shall pay a sum each month until a certain sum is paid, which shall be "in lieu of" alimony, held a decree for alimony.— Welty v. Welty, Ill., 63 N. E. Rep. 161.

77. DIVORCE — Alimony. — Where, pending suit for a divorce, the wife applied for temporary alimony, and the husband by his answer alleged the separation was caused by the misconduct of the wife, and his answer was sustained, held an abuse of discretion for the court to allow her alimony. — Williams v. Williams, Ga., 40 S. E. Rep. 782.

78. DRAINS - Jurisdiction. — In drainage proceedings, where a party files a remonstrance without objecting to the sufficiency of the notice or the filing of the petition, he waives all objections to the jurisdiction growing out of such matters. — Pittsburgh, C., C. & St. L. R. Co. v. Machler, Ind., 63 N. E. Rep. 210.

79. EJECTMENT—Evidence of Title.—In an action by an administrator involving title to land, defendant cannot show good title in himself by proving payment of taxes, or that the land had not been inventoried as part of the estate.—Bullock v. Dunbar, Ga , 40 S. E, Rep. 783.

80. EJECTMENT—Possession Under Bona Fide Claim.—Actual possession under *bona fide* claim of title by defendant held such color of title as to entitle him to recover for improvements under Comp. Laws, § 5455, in an action to recover realty, and he need not show a paper title.—Pendo v. Beakey, S. Dak., 89 N. W. Rep. 655.

81. ELECTIONS—Mandamus. — Under Acts 1901, p. 495, *mandamus* will not lie to compel a county committee to place on a ballot the name of a candidate for senator of a senatorial district, composed of two counties.—State v. Elliott, Ind , 63 N. E. Rep. 222.

82. EMIMENT DOMAIN—Market Value.—On proceedings for condemnation of land for cemetery purposes, an instruction that the jury should consider the fair cash market value of the land, if sold in the market for cash, held proper.—Phillips v. Town of Scales Mound, Ill., 63 N. E. Rep. 180.

83. EMINENT DOMAIN—Right of Way — Under Code, §§ 2015, 2016, where a right of way way previously condemned has been abandoned for over eight years, another company cannot condemn it as an abandoned right of way without compensation, though damages previously paid to prior owners have not been refunded.—Remey v. Iowa Cent. Ry. Co. Iowa, 89 N. W. Rep. 218.

84. EMINENT DOMAIN - Statute of Limitations.—Where a railway company, pursuant to municipal authority, lays a track in streets, and several years thereafter lays a second track, and the latter causes damages, the statute of limitations begins to run from the time of the laying of the second track.— Calument & C. Canal & Dock Co. v. Morawetz, Ill., 63 N. E. Rep. 165.

85. EQUITY—Laches.—Application of doctrine of laches does not depend on mere lapse of time, but on change of situation rendering relief equitable. — O'Brien v. Wheelock, U. S. S. C., 22 Sup. Ct. Rep. 354.

86. ESCAPE — Information.— In an accusation under Pen. Code, § 314, for escape, held not necessary to allege in the information where the court was located, or that it had jurisdiction to try the accused for the crime with which he was charged. — Daniel v. State, Ga., 40 S. E Rep. 805.

87. ESTOPPEL—Recitals of Deeds.— Where land is conveyed subject to a mortgage, the grantee cannot claim under the deed, and at the same time deny the validity of the clause limiting the interest conveyed. — McNaughton v. Burke, Neb., 89 N. W. Rep. 274.

88. ESTOPPEL — Services. — An officer, by certifying bills as correct, by which he draws money from the state treasury, held not estopped, by items therein for services rendered by plaintiff, to assert that plaintiff rendered only part of the service and was paid therefor. Richolson v. Moloney, Ill., 63 N. E. Rep. 188.

89. EVIDENCE—Action on a Bond. - In an action on a bond conditioned for the performance of a contract by a grain buyer, who agreed to deliver on demand the amount of grain on hand as shown by his daily reports, evidence of plaintiff's auditor, showing the result of his examination of such reports, held inadmissible.—Bartlett v. Wheeler, Ill., 63 N. E. Rep. 169.

90. EVIDENCE - Admissions.—Where admissions in an answer have been withdrawn by an amendment, they can still be offered in evidence against the defendant who has the right to disprove them.—Alabama Midland Ry. Co. v. Guilford, Ga., 40 S. E. Rep. 794.

91. EVIDENCE — Judicial Notice.—The supreme court will not take judicial notice of the laws of other states. —People's Building, Loan & Savings Assn. v. Backus, Neb , 89 N. W. Rep. 315.

92. EVIDENCE — Proceedings at Former Trial.—In an action on a note by a daughter against the estate of her deceased mother, proceedings in a former suit, by the judgment in which it was claimed plaintiff had received compensation for the services relied on as consideration for the note in suit, held admissible. - Mack v. Cole's Estate, Mich., 89 N. W. Rep. 564.

93. EVIDENCE—Withdrawal of Admissions - Where certain allegations in a petition are admitted in defendant's answer, and he files an amendment denying these allegations, with an affidavit as prescribed by Van Epps' Code Supp § 6199, held error to refuse to allow the withdrawal of the admissions.- Alabama Midland Ry. Co v. Guilford, Ga., 40 S. E. Rep. 794.

94. EXCEPTIONS, BILL OF Marginal Notes.—Where a bill of exceptions, embracing the evidence, contains 500 typewritten pages, without the marginal notes required by old rules of the appellate court (No. 30; 27 N. E Rep. vii.), the evidence will not be considered on appeal.— City of La Fayette v. Wabash R. Co., Ind., 63 N. E. Rep. 237.

95. EXECUTION — Bona Fide Purchaser. - A *bona fide* purchaser at sheriff's sale, with no notice of an equity, is protected against it.—Johnson v. Equitable Securities Co., Ga., 40 S. E. Rep. 787.

96. EXECUTORS AND ADMINISTRATORS—Contempt.—An executor ordered to account, filing an account containing no entries, held guilty of contempt.—*In re* People's Trust Co., 75 N. Y. Supp. 254.

97. EXECUTORS AND ADMINISTRATORS — Domicile of

Debtor.—For purposes of administration, the *situs* of a debt is the domicile of the debtor, and not the place where the evidence of the debt is located.—Michigan Trust Co. v. Probasco, Ind., 63 N. E. Rep. 255.

98. EXECUTORS AND ADMINISTRATORS—Jurisdiction of Court.—In an action by an administrator *de bonis non* to recover property from the executor of the former administrator, the fact that defendant had listed the property in another state as part of the estate of its decedent held not to deprive the court of jurisdiction of the subject-matter.—Michigan Trust Co. v. Probasco, Ind, 63 N. E. Rep. 255.

99. EXECUTORS AND ADMINISTRATORS—Quieting Title.—A complaint by one as executrix and individually to have the title quieted in her individually, against the provisions of the will, does not state a joint cause of action; it stating no cause in favor of the executrix—Hughes v. Hughes, Ind., 63 N. E. Rep. 250.

100. FEDERAL COURTS — Jurisdiction of United States Circuit Court. A suit by a transferee of bonds held not to substantially involve a dispute within the jurisdiction of a circuit court of the United States, within Act March 3, 1875, ch. 137, if transfers were made for collection of debt, and the amount is made up by uniting the bonds or coupons of several owners.—Waite v. City of Santa Cruz, U. S. S. C., 22 Sup. Ct. Rep. 327.

101. FEDERAL COURTS—Review by United States Supreme Court.—A federal question is sufficiently raised in a state court, for purpose of review by the Supreme Court of the United States, though it was not raised in the court to which the writ of error was directed, if it was raised in the supreme court.—Rothschild v. Knight. U. S. S. C., 22 Sup. Ct. Rep. 391.

102. FORCIBLE ENTRY AND DETAINER—Possession.—As the sole question was whether plaintiff was in actual possession at the time of the alleged forcible entry, defendant's title papers were not admissible in evidence for him. Terry v. Terry, Ky., 66 S. W. Rep. 1024.

103. FORGERY — Altering Records.—Indorsement of payment on a judgment pursuant to Burns' Rev. St. 1901, §§ 590, 980, held a record, within the meaning of section 2016, making it an offense to alter any record of a court of record.—State v. Henning, Ind., 63 N. E. Rep. 207.

104. FRAUD — False Entry in Books—A petition alleging a false entry in the books of plaintiff by defendant while in his employ, and alleging that it was not discovered until about the time the action was brought, held sufficient in an action to recover an overpayment.—Raymond v. Schriever, Neb., 89 N. W. Rep. 308.

105. FRAUD — Innocent Misrepresentation.—A misrepresentation may be actionable, though the person making it did not know it was false.—Beatty v. Bulger, Tex., 66 S. W. Rep. 893.

106. FRAUDS, STATUTE OF—Enforcement by Third Party.—An oral agreement by the grantee to pay part of the consideration agreed on as the purchase price of land to a third party may be enforced by the party for whose benefit it may be made. Dodd v. Skelton, Neb., 89 N. W. Rep. 297.

107. GAS—Discrimination.—A natural gas company, having laid its mains in town streets and acquired a monopoly, is impressed with a public character, and it must serve the inhabitants without invidious discrimination. Indiana Natural & Illuminating Gas Co. v. State, Ind, 63 N. E. Rep. 220.

108. GRAND JURY—Powers—Act Feb. 21, 1898, requiring magistrates to hold preliminary investigations in criminal cases beyond their jurisdiction, held not to oust the grand jury of its constitutional right to present such person by indictment.—State v. Brown, S. Car., 40 S. E. Rep. 776.

109. GUARANTY—Interest.—Persons guarantying interest on loan held not bound for interest accruing after its maturity.—Bousguet v. Ward, Iowa, 89 N. W. Rep. 196.

110. HIGHWAYS—Failure to Work on a Road.—On prosecution for failing to work on a road, it was proper in the superior court to allow an amendment to the warrant of the justice on the finding of a special verdict.—State v. Telfair, N. Car., 40 S. E. Rep. 976.

111. INJUNCTION—Sufficiency of Petition.—A petition alleging that a landowner without excuse persistently leaves open gates on a railway right of way at a farm crossing held to state a cause for an injunction.—Axthelm v. Chicago, R. I. & P. R. Co., Neb., 89 N. W. Rep. 313.

112. INJUNCTION—Withdrawal by Stipulation.—The withdrawal by stipulation of the only part of the case which can sustain an injunction is equivalent to a final determination against the right to injunction, authorizing suit on injunction bond.—Tullock v. Mulvane, U. S. S. C., 22 Sup. Ct. Rep. 372.

113. INTOXICATING LIQUORS — Application for License.—An application for liquor license under the ordinance held defective for not having the signatures of the property owners on both sides of the four streets bounding the block in which the dramshop is to be located.—Harrison v. People, Ill., 63 N. E. Rep. 191.

114. INTOXICATING LIQUORS — Estoppel.—Where, in an action under Code, § 2423, complaint alleged that plaintiff purchased liquor of defendant through his agent, he may not recover on a different theory, notwithstanding the agency is denied by defendant.—Foley v. Leisy Brewing Co., Iowa, 89 N. W. Rep. 230.

115. JUDGMENT—Collateral Attack.—A judgment recovered in an action on a judgment cannot be collaterally attacked on the ground that the original judgment was fraudulently obtained.—Shanahan v. City of South Omaha, Neb., 89 N. W. Rep 285.

116. JUDGMENT—Default.—The court has jurisdiction to render judgment in default consistent with the relief demanded in the complaint—McMahon v. Pugh, S. Car., 40 S. E. Rep. 961.

117. JUDGMENT—Enrollment.—Placing all papers belonging to a judgment roll in an envelope, properly indorsed, held an enrollment of the judgment. Melchers v. Moore, S. Car., 40 S. E. Rep. 733.

118. JURY—Ex parte Statement.—Under Code, § 3650, an appeal to a district court from a finding by supervisors as to the sufficiency of an *ex parte* statement of consent to the sale of intoxicating liquors is not triable by a jury.—Porter v. Butterfield, Iowa, 89 N. W. Rep. 199.

119. JUSTICES OF THE PEACE—Different Cause of Action.—Where plaintiff in replevin, on appeal from a justice, added an allegation of conversion, it was not an attempt to state a different cause of action.—Livingston v. Moore, Neb., 89 N. W. Rep. 289.

120. JUSTICES OF THE PEACE—Discontinuance of Suit.—Where a summons in a justice case was not served, but defendant appeared, a continuance for less 30 days from the date of the apppearance of defendant held not a discontinuance of the suit.—Reed v. Mott, Neb., 89 N. W. Rep. 277.

121. JUSTICES OF THE PEACE—Failing to Report.—Failure of justice to comply with Comp. Laws, § 1062, relating to reports of criminal cases, results in forfeiture of his fees.—Hutchinson v. Board of Suprs. of Ionia County, Mich., 89 N. W. Rep. 561.

122. LANDLORD AND TENANT—Abandonment of Possession.—A landlord, taking possession for himself of premises abandoned by the tenant, held to have accepted the abandonment as a surrender of the lease.—Armour Packing Co. v. Des Moines Pork Co., Iowa, 89 N. W. Rep. 106.

123. LICENSES—Merchants.—An ordinance imposing a license tax on city merchants, and dividing them into classes according to the amount of their sales, held not to violate the equity clause of Const. U. S. Amend. 14.—Clark v. City of Titusville, U. S. S. C., 22 Sup. Ct. Rep. 382.

124. LIMITATION OF ACTIONS—Fraud.—An action for relief on the ground of fraud may be brought at any time within four years from discovery of the fraud or of

facts sufficient to put a person on inquiry.—Raymond v. Schriever, Neb., 89 N. W. Rep. 308.

125. LIMITATION OF ACTIONS – Intervener. — Claim of intervener in suit held not barred by limitation against complainants in the suit; the intervening petition having been in time, though they were not named as parties by intervener till she filed an amended petition. —Knickerbocker v. Benes, Ill., 63 N. W. Rep. 174.

126. MASTER AND SERVANT – Vice-Principal. – The negligent act of a foreman in general control in ordering a workman on an elevator and operating it himself, to the workman's injury, was the act of a vice-principal.— Swift & Co. v. Bleise, Neb., 89 N. W. Rep. 310.

127. MORTGAGES—Assignment of Note. – Where a note secured by mortgage is transferred to a purchaser without an assignment of the mortgage, he becomes an equitable owner thereof.—First Nat. Bank v. Pope, Minn., 89 N. W. Rep. 318.

128. MORTGAGES — Consideration. — After a note and mortgage are introduced in evidence, it raises the presumption of a sufficient consideration, and the burden is on defendants to impeach the same.—Loan & Trust Co. Sav. Bank v. Stoddard, Neb., 89 N. W. Rep. 301.

129. MORTGAGES—Conveyance Subject to Mortgage.— A conveyance subject to mortgage is a conveyance of so much of the property only as is not required for payment of the mortgage debt. — McNaughton v. Burke, Neb., 89 N. W. Rep 274

130. MORTGAGES Sheriff's Return of Sale – Where the sheriff's return of sale shows a sufficient notice, that the printer's affidavit was made before notice was complete held immaterial. — Northwestern College v. Schreck, Neb., 89 N. W. Rep. 289.

131. MUNICIPAL CORPORATIONS—Abutting Owner.—An abutting owner is required to repair sidewalk only after notification by the city authorities. City of Lincoln v. Janesch, Neb., 89 N. W. Rep. 280.

132. MUNICIPAL CORPORATIONS—Assessments for Improvements. Landowners are not estopped to deny the constitutionality of a statute authorizing assessments for local improvements, as against the purchaser of bonds which such assessments should be used to pay, because they participated in the organization of the assessment district with the assumption that the act was valid. – O'Brien v. Wheelock, U. S. S. C , 22 Sup. Ct Rep 354.

133. MUNICIPAL CORPORATIONS — Assessments for Improvements. – Comp. Laws Mich. 1897, § 3406, held to furnish a rule of assessment sufficient to satisfy the constitutional guaranty of due process of law, where it provides that a municipal council may assess the costs of making a local improvement on the lands in the vicinity benefited thereby, and limits the assessment to the amount of benefits.—Voigt v. City of Detroit, U. S. S. C., 22 Sup. Ct. Rep. 337.

134. MUNICIPAL CORPORATIONS—Bona Fide Purchasers. – Recitals in refunding bonds issued for outstanding indebtedness held to estop the city, as against *bona fide* purchasers, from contending that the original bonds for which the refunding bonds were issued did not constitute a part of the bonded indebtedness of the city, of which the purchaser had notice.—Waite v. City of Santa Cruz, U. S. S. C., 22 Sup. Ct. Rep. 327.

135. MUNICIPAL CORPORATIONS—Constitutional Law.— Code, § 747, as amended by Acts 27th Gen. Assem. ch. 23, and Acts 28th Gen. Assem. ch. 25, authorizing the district court to appoint trustees of waterworks in cities of the first class, is unconstitutional and void as devesting the city of the management and control of its property.— State v. Barker, Iowa, 89 N. W. Rep. 204.

136. MUNICIPAL CORPORATIONS—Cost of Assessment.— Under Laws 1901, p 101, § 99, in a proceeding instituted in Chicago after the act went into effect, costs of making the assessment cannot be included in the assessment, though the ordinance was legal as to the costs when passed.—Gage v. City of Chicago, Ill., 63 N. E. Rep. 184.

137. MUNICIPAL CORPORATIONS—Power to Tax.—Where a city is granted general power to tax, it has all the powers of the legislature in regard to taxation.— Woodall v. City of Lynchburg, Va., 40 S. E. Rep. 915.

138. MUNICIPAL CORPORATIONS — Work and Labor – Compensation of Unskilled Labor.—Act March 6, 1899, does not prohibit a person contracting to perform unskilled labor on public works from agreeing to work for less than 15 cents per hour.—Bell v. Town of Sullivan, Ind., 63 N. E. Rep. 209.

139. NEGLIGENCE—Instructions.—Where plaintiff alleged several different acts of negligence, held error to charge that, if defendant was negligent in any of the particulars, it would be liable, as authorizing recovery, though defendant's negligence had not materially contributed to the injury.—Alabama Midland R. Co. v. Guilford, Ga., 40 S. E. Rep. 794.

140. NEGLIGENCE Pleading.—In an action against a railway company for injuries sustained by alighting from a train, it was not error to reject evidence that there were no lights at the station; failure to provide lights not being pleaded.—Milligan v. Texas & N. O. R. Co , Tex., 66 S. W. Rep. 896.

141. PARTIES—Permitting Improper Parties to Intervene.—Permitting an improper and unnecessary party to intervene in an action on a note held prejudicial error.—Wilson v. Tyler Coffin Co., Tex., 66 S. W. Rep. 865.

142. PLEADING – Grounds of Recovery Insufficiently Stated.—A complaint in an action for injury to a servant, alleging three distinct grounds of recovery, is not bad because two of them are not sufficiently stated.— Beuhner Chair Co. v. Feulner, Ind., 63 N. E. Rep. 239.

143. PLEADING - Inconsistencies of Reply and Petition.— Allegations of a reply are not to be considered in connection with the petition, and, if both together are inconsistent with the findings, the latter cannot be sustained.—Solt v Anderson, Neb , 89 N. W. Rep. 306.

144. PLEADING—Petition.—The legal sufficiency of a petition cannot be brought in question by an objection to evidence introduced in support of the petition.— Fleming v. Roberts, Ga., 40 S. E. Rep. 792.

145. PRINCIPAL AND AGENT – Authority of Agent.— Where a prudent man would be justified in presuming that the agent has authority to perform a particular act, the principal is estopped from denying the agent's authority as to such third person.—Harrison Nat. Bank v. Williams, Neb., 89 N. W. Rep. 245.

146. PRINCIPAL AND AGENT — Authority of Agent.— That a person is authorized to receive installments of interest on a mortgage note held not to show authority to collect the principal, where the evidence of the debt is not in his possession.—Dewey v. Bradford, Neb., 89 N. W. Rep. 249.

147. PRINCIPAL AND AGENT—Recovery of Funds from Agent.—Where a principal furnished an agent with funds for an illegal purpose, his only remedy is *in assumpsit* to recover any advance not actually used by the agent.—Benton v. Singleton, Ga., 40 S. E. Rep. 811.

148. PRINCIPAL AND SURETY – Liability for Breach of Contract.—A surety on a bond conditioned for the performance of a contract held not liable for breach committed prior to the execution of the contract and bond. —Bartlett v. Wheeler, Ill., 63 N. E. Rep. 169.

149. QUIETING TITLE—Color of Title.—A deed void under Code 1873, § 1550, held not to constitute color of title sufficient to entitle the grantee to the value of improvements placed on the property while in possession thereof.—Lindt v. Uihlein, Iowa, 89 N. W. Rep. 214.

150. QUIETING TITLE – Public Highway. — The complaint in a suit to quiet title against a city, and to restrain it from constructing a highway on the lands which were claimed by adverse possession, held to contain a sufficient denial of the existence of a public highway over the lands.—City of La Fayette v. Wabash R. Co., Ind., 63 N. E. Rep. 237.

151. RAILROADS—Abandonment of Title. The failure of a railroad company for 10 years to use a lot which it had acquired in condemnation proceedings, and which the

former owner had conveyed to it, held not to show an abandonment of title thereto of an owner in fee.—Struve Republican Val. R. Co., Neb., 89 N. W. Rep. 604.

152. RAILROADS—Trespasser.—A person walking on railroad tracks near a depot, having no business with the company, held a trespasser.—James v. Illinois Cent. R. Co., Ill., 53 N. E. Rep. 153.

153. RELIGIOUS SOCIETIES—Rights of Minority Members.—A minority of the members of a religious corporation organized under Laws 1883, p. 177, cannot retain possession of the corporate property, to compel the corporation to recognize their rights as members.—St. Andrew's Church of Tecumseh v. Shaughnessy, Neb., 89 N. W. Rep. 261.

154. SALES—Action for Price.—Acceptance by a vendor of merchandise of checks for less than the contract price, with knowledge that the vendee intended such checks to be in full, held to constitute full settlement.—Whitaker v. Eilenberg, 75 N. Y. Supp. 106.

155. SCHOOLS AND SCHOOL DISTRICTS — Destruction of Civil Municipal Corporation. — Under Burns' Rev. St. 1901, § 5914, and Const. art. 8, §§ 1, 8, the destruction of the civil municipal corporation does not work a dissolution of the school corporation because of the necessary interdependence of the two. — State v. Ogan, Ind. 63 N. E. Rep. 227.

156. SPECIFIC PERFORMANCE—Homestead. — Where a contract for the sale of a homestead is not acknowledged by the vendors, it cannot be enforced against the other party.—Solt v. Anderson, Neb., 89 N. W. Rep. 306.

157. STATUTES—Intent. — In determining the intent of the legislature, all the provisions of the statute bearing on the point in issue should be considered.—City of Lincoln v. Janesch, Neb., 89 N. W. Rep. 280.

158. STREET RAILROADS Responsibility for Defects in Street.—In an action against a street railroad company for injuries sustained by a passenger in stepping into a hole in the pavement, a resolution of the city council authorizing the repaving and repair of the pavement held admissible on the question of the company's negligence.—Welch v. Syracuse Rapid Transit Ry. Co., 75 N. Y. Supp. 173.

159. STREET RAILROADS—Right to Mortgage. — Under Rev. St. ch. 114, § 19, par. 10, a street railroad company may mortgage its property and franchise, notwithstanding the ordinance granting the franchise restricts the grant to such company only. — Wells v. Northern Trust Co., Ill., 63 N. E. Rep. 136.

160. TAXATION—Forfeiture.—Where, in proceedings to collect taxes on real estate, there has been a forfeiture in fact for want of bidders at the tax sale, the owner is chargeable personally in an action against him to collect the taxes, and in such action irregularities in prior proceedings to collect the tax will not be inquired into.—Carrington v. People, Ill., 63 N. E. Rep. 163.

161. TAXATION—Statutory Period of Redemption. The court cannot extend the statutory period within which redemption from a tax sale is to be made, and money paid under such an order, but after the statutory period has expired, is unavailable for redemption. — Bitzer v. Becke, Iowa, 89 N. W. Rep. 193.

162. TAXATION — Validity of Tax. — Where a village treasurer collects moneys raised by county taxation, it being his duty under his warrant to pay over the same to the county treasurer, he cannot justify a retention of the money by questioning the validity of the tax. — Battles v. Doll, Wis., 89 N. W. Rep. 187.

163. TELEGRAPHS AND TELEPHONES Damages.—Where a telegraph company misquotes the price of an article by telegram, it is liable for any damages resulting from the acceptance of the proposal as contained in the telegram. Western Union Tel. Co. v. Flint River Lumber Co., Ga., 40 S. E. Rep. 815.

164. TIME "Thirty Days" as a Month.—A sentence imposing 30 days' imprisonment is a compliance with the mimimum imprisonment authorized as a statute, providing for imprisonment of not less than "one month" or more than two years. — McKinney v. State, Tex., 66 S. W. Rep. 769.

165. TOWNS—Res Judicata.—A judgment in favor of a town against a village included therein, before the separation of the town and village, under Laws 1897, ch. 287, held not *res judicata* as to the rights of the parties in the judgment on their separation. — State v. Maick, Wis., 89 N. W. Rep. 183.

166. TRESPASS—Title Acquired After Action. — Where, in trespass, defendant has a defense when the suit is brought, he cannot be deprived thereof by a third person ratifying a deed which at the time of the commencement of the suit was without binding force. — Graham v. Williams, Ga., 40 S. E. Rep. 790.

167. TRIAL—Burden of Proof. — Where defendant, on whom was the burden of proof, was given the concluding argument, he cannot complain that the court first ruled that the burden was on plaintiffs.—Stem v. Whitney, Ky., 66 S. W. Rep. 820.

168. TRIAL—Grounds of Objection.—Objection to statements of counsel to the jury as to damages awarded in similar cases held good, though no grounds for such objection were stated.—Chicago, I. & L. Ry. Co. v. Martin, Ind., 63 N. E. Rep. 247.

169. TRIAL—Improper Remarks of Judge. — Where a judge improperly states the argument of counsel, his attention should be called to it at the time. — Hatchell v. Chandler, S. Car., 40 S. E. Rep. 777.

170. TRIAL—Opening and Closing. — Where judgment would go against plaintiff, if no evidence was produced, defendant has not the right to open and close.—Axtheim v. Chicago, R. I. & P. R. Co., Neb., 89 N. W. Rep. 313.

171. TRIAL—Rules of Court. — Though a rule of court requires propositions to be submitted before argument, the court should receive propositions submitted after argument, where counsel states he thought the rule required the propositions to be submitted before judgment.—Mann v. Learnard, Ill., 63 N. E. Rep. 178.

172. VERDICT—Impeachment by Affidavit of Jurors.—Affidavits of jurors after trial held not receivable for purpose of impeaching their verdict.—Phillips v. Town of Scales Mound, Ill., 63 N. E. Rep. 180.

173. WATERS AND WATER COURSES—Evidence of Effect of Pollution.—Testimony of physicians as to the probable effect on milch cows of drinking water after contamination by sewage held admissible in a suit for polluting a stream. — Hollenbeck v. City of Marion, Iowa, 89 N. W. Rep. 210.

174. WILLS—Election by Devisee.—A devisee, after entering on land and remaining satisfied for more than 13 years, cannot render possession to the executor, and disclaim all interest in the property, in order to defeat a levy of execution on a judgment against her. — Crumpler v. Barfield & Wilson, Ga., 40 S. E. Rep. 808.

175. WILLS—Lien of Legacies. — Where executors are legatees, and have given bond required by Comp. St. § 2679, they take the estate fee from the lien of the legacies, but, if the bond of a general executor is given, the legacies will be a charge on the estate.—Herdlitchka v. Foss, Neb., 89 N. W. Rep. 300.

176. WILLS—Purchaser Deriving Title Through a Will.—A purchaser of land from an executor, deriving title through the will as residuary legatee, is bound by the terms of the will imposing a charge on the land. — Herdlitchka v. Foss, Neb., 89 N. W. Rep. 300.

177. WITNESSES Improper Question.—Where a police officer was a witness in behalf of the prosecution, a question to the witness stating, "I want to show that the witness has known the accused a long time, and has had him under observation for other jobs," is erroneous.—Leo v. State, Neb., 89 N. W. Rep. 303.

178. WITNESSES—Usury.—Where a mortgagor retains after sale any interest in mortgaged premises, or any personal liability is sought to be enforced against him, he may set up usury in a suit to foreclose the mortgage. —People's Building, Loan & Savings Assn. v. Palmer, Neb., 89 N. W. Rep. 216.